At approximately the same time as the Tenth Circuit's ruling in *Galloway*, the Second Circuit adopted a similar rule. In *Riascos-Prado v. United States*, 66 F.3d 30, 35 (2d Cir. 1995), the court of appeals held that an ineffective assistance claim on direct appeal, based on evidence intrinsic to the record, does not bar an ineffective assistance claim based on other grounds in a §2255 motion.[6] The court reasoned that ineffective assistance claims based on intrinsic evidence constitute separate "grounds" from other ineffective assistance claims for the purposes of a bar against bringing such claims in a §2255 motion. *See id.* This holding was subsequently extended to require collateral review of an ineffective assistance claim based upon "different factual premises" than the ineffective assistance claim brought on direct appeal. Citing the Tenth Circuit's decision in *Galloway*, the Second Circuit held:

> Although it is well established that section 2255 "may not be employed to relitigate questions which were raised and considered on direct appeal," we have ruled that ineffective assistance of counsel claims based upon entirely different factual premises do not constitute the "same ground for relief" within the meaning of this procedural rule.

Portello v. United States, 113 F.3d 1230 (table), *available at* 1997 WL 218780, at *1 (2d Cir. 1997) (internal citations omitted). Even though *Riascos-Prado* and *Portello* were decided before *Massaro*, which overruled the Second Circuit's requirement that ineffective assistance claims based on intrinsic evidence be brought on direct appeal, they continue after *Massaro* to be cited for the proposition that a

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[6] At the time *Riascos-Prado* was decided, the law of the Second Circuit was that when a defendant was represented by new counsel on appeal and the ineffective-assistance claim was based solely on the record made at trial, the claim must have been raised on direct appeal; failure to do so resulted in procedural default unless the petitioner could show cause and prejudice. *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993). *Massaro* overturned this rule.

"petitioner cannot [in an initial §2255 proceeding] be barred from raising ineffectiveness claims that could *not* be supported by the record below at the time of his direct appeal." *Pitcher v. United States*, No. 03-CV-3174, 2005 WL 1278451, at *16 (E.D.N.Y. May 31, 2005) (emphasis in original).

After considering the Tenth Circuit's position but with no reference to the Second Circuit, the Seventh Circuit adopted the opposite rule. Specifically, the Seventh Circuit held that an ineffective assistance claim brought on direct appeal bars a claim of ineffective assistance on different grounds in a first §2255 motion. *See* App. at 60a. It reached its conclusion by the rigid application of two doctrines.

First, the Seventh Circuit applied "the rule that a person who has raised an issue, and had it resolved by a federal court, cannot start from scratch on collateral review and ask the judiciary to proceed as if the first resolution had not occurred." *Id.* at 62a. This, the court explained, is the "law of the case" doctrine, which applies to initial §2255 motions on the authority of this Court's decision in *Davis v. United States*, 417 U.S. 333. *See id.* at 63a.[7] Second, the court below wrote that all reasons given for a lawyer's ineffectiveness constitute a single "ground of relief" for the purposes of the law of the case. *Id.* ("Although Peoples now wants to present new instances of supposed shortcomings, ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed."). The court acknowledged that Peoples had asserted in his §2255 motion new reasons not raised on direct appeal for his trial counsel's ineffectiveness, but it concluded that "this is exactly the sort of thing that the law of the case cuts off: it blocks new theories as well as old ones." *Id.* at 61a. Finally, the Seventh Circuit recognized that the Tenth Circuit "sees things differently," but asserted that *Galloway*

[7] For a discussion of the Seventh Circuit's interpretation of *Davis*, see Section III, *infra*.

"does not persuade us to abandon the doctrine of law of the case in federal collateral review under §2255. The tenth circuit stands alone on this subject." *Id.* at 66a.

Section 2255 motions raising ineffective assistance claims are filed frequently. As a result of the current conflict among the courts of appeals, some federal prisoners are denied basic procedural rights that others enjoy. This Court's review of this case would eliminate these important and recurring disparities.

B. The Decision Below Conflicts in Principle with this Court's Decision in *Massaro*

This Court's recent jurisprudence has stressed the importance of procedural rules that encourage claims to be brought at the proper time and in the proper forum. The rule of the Second and Tenth Circuits accomplishes this goal, but the rule of the Seventh Circuit discourages appellants from raising on direct appeal those ineffective assistance claims capable of being resolved at that time. Consequently, the Seventh Circuit rule will require the court of appeals in some cases to postpone consideration of a dispositive claim only to reach issues that have less merit.

In *Massaro*, this Court explained that "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." 538 U.S. at 504 (quoting *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring)). It is widely recognized that "in most cases a motion brought under §2255 is preferable to direct appeal for deciding claims of ineffective-assistance." *Id.* Consequently, this Court adopted a rule in *Massaro* designed to encourage the bringing of most ineffective assistance claims in a collateral proceeding. *See id.* at 505 ("Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court.").

But not every claim of ineffective assistance is best reserved for a collateral proceeding. When the record available on direct appeal makes evident that trial counsel was ineffective, it would be counterproductive to postpone adjudication of the claim. Doing so would require the court of appeals to decide other claimed errors only to have the sentence vacated in a subsequent collateral proceeding.[8] Just as procedural rules should be designed to encourage appellants to reserve most ineffective assistance claims for a collateral proceeding, so too should they be fashioned to encourage litigants to present on direct appeal claims more properly adjudicated there.

The decision below will have just the opposite effect. It will discourage appellants from raising any ineffective assistance claim on direct appeal by subjecting them to an unjustifiable risk: federal convicts in the Seventh Circuit have nothing to gain and everything to lose by bringing an ineffective assistance claim on direct appeal. If they wait they will not be precluded from bringing their claim later, but if they assert a reasonable claim on direct appeal and lose, they will have waived their right to an evidentiary hearing on the issue in a §2255 proceeding. Consequently, no ineffective assistance claim will be brought on direct appeal, denying courts the opportunity to resolve some claims expeditiously.

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[8] *See* Transcript of Oral Argument at 7, *Massaro*, 538 U.S. 500 (2003) (No. 01-1559) 2003 WL 840200 ("Suppose you have a case where—and you stated earlier that this doesn't happen very often, but suppose it's evident on the face of the record that the counsel was ineffective. He stands up and says on the record, Your Honor, I wish the record to show I've been asleep for an hour during the key cross examination. Isn't there also an efficiency in just sending it back for new trial right away, rather than going through all of the other claimed errors? . . . I mean, if it's evident that the case has to go back, why have the district court—or, pardon me, the appellate courts examine the entire record and—and give a lengthy opinion that's obviously going to be unnecessary?"). Such claims will admittedly be uncommon. *See Massaro*, 538 U.S. at 507 ("we think few [ineffective assistance] claims will be capable of resolution on direct appeal").

On the other hand, the rule in the Second and Tenth Circuits complements the rule in *Massaro*. By removing the threat of waiver of one's right to an evidentiary hearing, that rule encourages litigants with developed ineffective assistance claims to raise them at the earliest opportunity.

In *Massaro*, this Court recognized the unique challenges that ineffective assistance claims present to the policies governing whether claims should be brought on direct appeal or in a collateral proceeding. There the Court recognized the need for an exception to the procedural default rule established in *United States v. Frady*.[9] The Court should now recognize the need for an exception to relieve the combined effects of the law of the case doctrine and the rule treating all factual bases for an ineffective assistance claim as a single ground for relief.

C. The Decision Below Reflects a Misunderstanding of this Court's Decisions Regarding the Applicability of the Law of the Case Doctrine to First Motions Pursuant to §2255

The decision of the court below is based upon the premise that the law of the case doctrine applies to issues presented in an initial §2255 motion. But nothing in the United States Code suggests this was Congress's intent, and the opinions of this Court address the issue only in dicta. Furthermore, this Court's holding in *Davis v. United States*, 417 U.S. 333 (1974), has been misinterpreted by courts of appeals, including the Seventh Circuit below, to hold that the law of the case does apply to initial §2255 motions. Consequently, this Court should review the decision below to clarify the extent to which, and on what authority, district courts should apply the law of the case doctrine to first motions filed pursuant to 28 U.S.C. §2255.

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[9] 456 U.S. 152, 167-68 (1982) (establishing the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice).

Section 2255 instructs district courts to grant a hearing and determine the issues raised by a federal prisoner who claims his or her sentence was imposed in violation of the Constitution, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." A second or successive motion must contain newly discovered evidence or be based on a new rule of law, but nothing in the statute imposes similar restrictions upon initial motions. This Court addressed the question whether rules of preclusion apply to initial §2255 motions in a footnote to *Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969),[10] and two concurring opinions have catalogued the practices of the courts of appeals. *See Reed v. Farley*, 512 U.S. 339, 358 (1994) (Scalia, J., concurring); *Withrow v. Williams*, 507 U.S. 680, 720-21 (1993) (Scalia, J., concurring).

The court below cites this Court's decision in *Davis* for the proposition that rules of preclusion developed for successive rounds of collateral review apply equally to an initial collateral proceeding. *Davis* is an extension of this Court's ruling in *Sanders v. United States*, which held:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

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[10] "Where a trial or appellate court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a §2255 hearing. Section 2255 provides for hearing '(u)nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . .' In *Sanders v. United States*, we announced standards governing the determination whether a hearing should be ordered in the case of a successive motion under §2255. Similarly, where the trial or appellate court has had a 'say' on a federal prisoner's claim, it may be open to the §2255 court to determine that on the basis of the motion, files, and records, 'the prisoner is entitled to no relief.'" (internal citations omitted).

373 U.S. 1, 15 (1963).[11] According to the court below, "[a]lthough *Sanders* dealt with successive rounds of collateral proceedings, the [U.S. Supreme] Court has held that its approach applies equally when the same issue is raised on direct appeal and again on an initial round of collateral review." App. at 63a (citing *Davis*).[12]

But this is a misreading of *Davis*. The *Sanders* Court had said that "[e]ven if the same ground was rejected on the merits on a prior application . . . the applicant may be entitled to a new hearing upon showing an intervening change in the law." 373 U.S. at 16-17. *Davis* merely clarified that the right to a hearing following a change in law extends to initial §2255 motions. It held that claims adjudicated on direct appeal are *not* barred in a §2255 motion if there has been an intervening change in law; it did not hold that they *are* barred if there has been no change. *See* 417 U.S. at 342.[13] In fact, *Davis* made clear that "[t]he sole issue before the Court in the present posture of this case is the propriety of the Court of Appeals' judgment that a change in the law of that Circuit

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[11] This rule has since been modified by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[12] Other United States Courts of Appeals have interpreted *Davis* similarly. *See, e.g., United States v. Horne*, 203 F.3d 53 (table), *available at* 2000 WL 60246, at *1 (D.C. Cir. 2000) ("It is well established that a federal prisoner cannot raise collaterally any issue litigated and adjudicated on direct appeal, absent highly exceptional circumstances such as an intervening change in law. *See Davis v. United States*, 417 U.S. 333, 342 (1974).").

[13] "In *Sanders*, the Court held *inter alia*, that even though the legal issue raised in a §2255 motion 'was determined against (the applicant) on the merits on a prior application,' 'the applicant may (nevertheless) be entitled to a new hearing upon showing an intervening change in the law. . . .' The same rule applies when the prior determination was made on direct appeal from the applicant's conviction, instead of in an earlier §2255 proceeding, 'if new law has been made . . . since the trial and appeal.' Thus, the Court of Appeals erred in holding that 'the law of the case,' as determined in the earlier appeal from the petitioner's conviction, precluded him from securing relief under §2255 on the basis of an intervening change in law." (citations omitted).

after the petitioner's conviction may not be successfully asserted by him in a §2255 proceeding." *Id.* at 341. The Seventh Circuit's interpretation of *Davis*—that it expands the *Sanders* rule to *preclude* claims brought in initial §2255 proceedings—would therefore extend this Court's holding in *Davis* beyond the issues presented in that case.[14]

This Court has never held that the law of the case doctrine applies to initial motions under §2255.[15] Because the decision below relies heavily on that premise, and because it cites this Court for its authority, this case presents an opportunity for the Court to clarify the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[14] The Seventh Circuit's interpretation of *Davis* is at odds with its interpretation of *Massaro*, which the Seventh Circuit properly interpreted to have "left open" the question whether a litigant can bring an ineffective assistance claim on direct appeal and again on collateral review. *See* App. at 64a.

[15] Recently, this Court only "[a]ssum[ed] for argument's sake" that the law of the case doctrine applies to initial §2255 motions. *See Castro v. United States*, 540 U.S. 375, 384 (2003).

APPENDIX

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[June 30, 1999]

3:98-CR-0055RM

UNITED STATES OF AMERICA

v.

ROBIN PEOPLES

Robert L. Miller, Jr., Judge

ORDER

Because the defendant is represented by counsel, he is not authorized to make his own filings in this court. Accordingly, the court STRIKES the defendant's *pro se* motion for new trial (filed June 24, 1999). The court further informs the defendant (who has written the court several letters since the verdict was returned, but none in the form of a formal motion such as his motion for new trial) that all papers that he sends to the court are copied and made available to all counsel, including the United States Attorney's Office, and may be used against the defendant if and when appropriate, even if formally stricken from the record.

SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[November 15, 1999]

3:98-CR-0055RM

UNITED STATES OF AMERICA

v.

ROBIN L. PEOPLES

Robert L. Miller, Jr., Judge

MEMORANDUM AND ORDER

On January 26, 1999, after a twelve-day trial, a jury found Robin Peoples guilty of several charges arising from a series of four armed bank robberies. Several things of importance to the case occurred after that, but most importantly, no motion for new trial was filed within the seven working days after the verdict was returned, and no extension of the deadline was granted. The case is now before the court on Mr. Peoples's motion for new trial pursuant to Fed. R Crim. P. 33, and on the government's request, made at the close of the first day of the receipt of evidence on that motion, to terminate the hearing and deny the motion.

On March 31 (with sentencing then set for April 13), the court received a letter from Mr. Peoples in which he raised many concerns, chief among which were that his trial attorney had been drinking during trial days, and that his attorney had refused to submit information about newly discovered

evidence that the three of the government's primary witnesses had lied at trial. On April 8, the court received a letter from Mr. Peoples in which he asked for a copy of his presentence report and claimed he had not yet seen it (the presentence report stated that Mr. Peoples's attorney, C. Kenneth Wilber, had advised the probation office that the defense had no objections to the report). On April 9, the court received a copy of a letter from Mr. Peoples to Mr. Wilber setting forth essentially the same allegations as the letter the court received on March 31.

The sentencing hearing was vacated to allow Mr. Peoples and Mr. Wilber a chance to meet. On April 22, the court received another letter from Mr. Peoples asking for a chance to present his newly discovered evidence. On May 3, Mr. Peoples filed a motion asking that new counsel be appointed; he attached affidavits from several inmates. The court rescheduled the sentencing hearing for June 10, with the intention of addressing the apparent rift between counsel and client at that time. When Mr. Peoples continued to submit affidavits, the court appointed another attorney to represent Mr. Peoples and continued the June 10 sentencing to July 13. Mr. Peoples continued to submit pro se papers, which the court struck. At the July 13 sentencing hearing, Mr. Peoples (by counsel) moved for a continuance to allow witnesses to be presented in support of Mr. Peoples's motion for new trial (which was among the papers ordered stricken). Over the government's objection and in the hope of devising an orderly process, the court afforded Mr. Peoples and his attorney time in which to file a motion for new trial, and established time for response. Following briefing of the new trial motion, the court concluded an evidentiary hearing on the new trial motion was needed.

That hearing began on November 12. The marshal could not arrange the attendance of all the inmate witnesses Mr. People had subpoenaed, but the court heard all other evidence, including all the evidence pertinent to whether Mr. Peoples received effective assistance of counsel. At the

beginning of the day, the government asked the court to rule in the government's favor, without evidence, on two of the three issues raised in the motion for new trial; the court declined, preferring to hear evidence before addressing the issues on which the government's motion relied. At the day's close, the government asked the court to terminate the hearing and rule in its favor on all points raised in the defendant's motion for new trial. The court indicated an intent to grant the government's motion; in this memorandum, the court does so.

A motion for new trial in a criminal case must be filed within seven days of the verdict. Fed. R. Crim. P. 33. That time limit is, except in unusual circumstances, jurisdictional, United States v. Washington, 184 F 3d 653, 659 (7th Cir. 1999) ("the district court was without jurisdiction to consider it. Pursuant to Fed. R. Crim. P. 33, a motion for a new trial must be made 'within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.' The only exception to that rule is for motions involving newly-discovered evidence...."), and forms the basis for the government's pre-hearing motion to deny most of Mr. Peoples's motion. The court declined because of the concern, in light of the allegations that Mr. Peoples raised, that the untimeliness arose from ineffective assistance of counsel. *See* United States v. Kladouris, 739 F. Supp. 1221 (N.D. Ill. 1990). Given the potential sentence Mr. Peoples faces—95 years on mandatory minima alone, without regard to any sentencing guideline issues—the court thought it best to afford Mr. Peoples the benefit of any doubt as to his right to a hearing.

Resolution of the ineffective assistance claim determines the scope and definition of the remaining inquiry. The Sixth Amendment to the United States Constitution assures criminal defendants the right to effective assistance of counsel. When evaluating a claim of ineffective assistance of counsel, the court inquires (a) whether counsel's performance fell below an objective standard of reasonableness (while

recognizing a strong presumption that counsel rendered reasonably effective assistance) and (b) whether but for counsel's unprofessional errors, the result of the proceeding would have been different, meaning that the errors were so serious as to deprive the defendant of a fair trial with a reliable result. Strickland v. Washington, 466 U.S. 668, 687-688 (1984).

A showing that an attorney was under the influence of alcohol during trial doubtlessly would satisfy the first prong of the Strickland test. One can also envision a showing that counsel's preparation, either before or during trial, was affected by intoxication, causing the attorney's performance to fall below an objective standard of reasonableness. Mr. Peoples, however, did not present evidence even approaching such a showing.

Mr. Peoples says he thought he smelled alcohol on Mr. Wilber's breath. He testified to having smelled it once; his written materials claim he smelled it on three occasions; another witness testified that she thought she briefly smelled alcohol on Mr. Wilber's breath twice during the twelve-day trial. Mr. Peoples also offered hearsay reports not related to the time of his trial,[1] and presented evidence that on one evening during trial, Mr. Wilber drank two beers near midnight. This evidence provides no support for a finding that Mr. Wilber's performance in Mr. Peoples's trial, or his preparation for Mr. Peoples's trial, fell below an objective standard of reasonableness. Nothing in the record of proceedings in open court would support such an alcohol-related finding, either.

Mr. Peoples also presented other complaints about Mr. Wilber's performance. All suffer from a lack of proof, from Mr. Peoples's lack of understanding of the law, and/or

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[1] That Mr. Wilber was charged with driving while intoxicated as a result of events alleged to have occurred well after Mr. People's trial has virtually no probative value; Mr. Wilber's eventual acquittal of that charge at trial virtually erases even that minuscule probative value.

from Mr. Peoples's lack of credibility. The court treads carefully on the last point because Mr. Peoples's alleged perjury at trial forms one basis for a proposed enhancement of his offense level pursuant to U.S.S.G. § 3C1.1, and Mr. Peoples has had neither the occasion nor the opportunity to be heard on that issue. Limiting itself to the testimony Mr. Peoples gave at the November 12 hearing, the court finds that Mr. Peoples's testimony was unbelievable, virtually in its entirety. On some points (discussed below), his testimony was soundly refuted; on others, Mr. Peoples's demeanor (specifically, his nearly steadfast refusal to answer a question until it had been asked three or four times) left him without credibility. The court accepts none of Mr. Peoples's testimony that is not corroborated by other witnesses.

Some of Mr. Peoples's claims are demonstrably untrue. He says Mr. Wilber failed to show the jury a co-defendant's photograph that eyewitness Scott Sult picked out as the bank robber; Mr. Wilber questioned Mr. Sult—the defense's first trial witness—about that identification, and had admitted Defendant's Exhibits C (the photo array) and D (the artist's depiction that Mr. Sult helped produce). Mr. Peoples says Mr. Wilber did nothing about the panel that produced an all-white jury, but Mr. Wilber successfully asked the court to inquire into the jurors' racial views, and Mr. Peoples suggests no other action Mr. Wilber might have taken.

The court finds others of Mr. Peoples's claims to be untrue after weighing the evidence presented at the hearing.[2] Mr. Peoples testified that Mr. Wilber rarely saw him before or during trial. The court does not believe that testimony. Mr. Wilber, who was a far more believable witness than was Mr. Peoples, estimated that he spent thirty to forty hours in conversation with Mr. Peoples, either telephonically or in person. Mr. Wilber's time records, which he testified did not

[2] Mr. Peoples has three additional witnesses he would like to call, but none would relate to issues of effective assistance of counsel.

include all of the time spent speaking with Mr. Peoples,[3] corroborate Mr. Wilber's estimate for the most part. The court finds that Mr. Wilber spent extensive (and adequate) time conferring with Mr. Peoples and potential witnesses. Mr. Wilber adequately prepared himself and the witnesses (including Mr. Peoples, who testified at trial despite Mr. Wilber's prophetic warning that defendants often do themselves more harm than good by testifying).

Others of Mr. Peoples's claims relate to tactical decisions well within the range of what a reasonable criminal defense attorney would do. Mr. Peoples complains that Mr. Wilber did not object to juror Ball, whom Mr. Peoples stubbornly sees as having had a conflict of interest—juror Ball's wife worked at a credit union that was suing Mr. Peoples for an unpaid loan. The court specifically inquired of juror Ball about his wife, at Mr. Wilber's request, during jury selection. As Mr. Wilber testified at the November 12 hearing, the suit on the loan could be seen as a point for the defense (more than $100,000 was taken in the charged bank robberies, so it would be odd that Mr. Peoples could not pay his debts); indeed, Mr. Wilber presented the loan records (Defendant's Exhibit L) and Mr. Peoples testified about the lawsuit. Those are reasonable matters for an attorney to consider in making tactical decisions concerning use of the limited number of peremptory challenges, and Courts do not "second-guess trial tactics that are rationally based." United States v. Zarnes, 33 F.3d 1454, 1473 (7th Cir. 1994).

The same may be said of the decision not to seek phone records relating to a phone call between Mr. Peoples and FBI agent Ronald Ryniak that became something of a peripheral

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[3] Mr. Peoples would call Mr. Wilber at home, and the time records apparently did not include that time. Carolyn Deranek, Mr. Wilber's paralegal during the Peoples trial, corroborated both the frequency of Mr. Peoples's calls to the office, and also provided her own experience of Mr. Peoples placing a call to her residence.

issue at trial. So, too, were the stipulations[4] a tactical decision. Mr. Peoples presented an alibi defense, and the cleanest method of presenting an alibi defense involves lack of contest that someone committed the crimes charged. It is not unreasonable for a defense attorney to conclude that stipulations are a wiser course than insisting that the government present several witnesses whose testimony would not affect the alibi, but who could not be cross-examined effectively. Similarly, there would be little point in using limited preparation time to arrange for Mr. Peoples (who claimed not to have been in the banks) to view surveillance tapes and photos of the robberies. Finally, declining to argue the lack of any FBI search of Mr. Peoples's residence was a tactical decision—a sound one, in the court's view, in light of the time that had passed between the last robbery and the investigation of Mr. Peoples.

Finally, Mr. Peoples's other claims appear to disclose ignorance of the rules of procedure and evidence. He complains that Mr. Wilber should have objected to statements the prosecutor made in closing argument that he felt were misleading. As long as the statements were based on the evidence or reasonable inference from the evidence, Mr. Peoples's disagreement with them offer no basis for objection. See, e.g., United States v. Renteria, 106 F.3d 765, 767 (7th Cir. 1997). If Mr. Wilber had objected as

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[4] Mr. Peoples stipulated, in accordance with Mr. Wilber's advice, that the vehicle described in count 4 was used in interstate commerce and was recovered burning in a field after the December 12, 1997 NBD robbery; that the vehicle described in count 8 was used in interstate commerce and was recovered burning in a field after the December 26, 1997 Valley American Bank robbery. He also stipulated that each of the victim banks had their deposits insured by the F.D.I.C. on the dates of the robberies, that the banks were robbed on the dates charged, that the dollar amounts set forth in the counts were taken from the banks, and that a Tech 9 assault weapon was displayed and brandished in each of those bank robberies. Mr. Peoples also stipulated that a bomb threat call was placed to an Elkhart elementary school 9:22 a.m. on December 12, 1997 from a pay phone at 2701 West Lexington in Elkhart.

Mr. Peoples wished, he would have succeeded only in being overruled after interrupting his adversary's argument. Mr. People complains that Mr. Wilber should have tendered a jury instruction about government witness Rachel Palomin having lied to the grand jury, but he offers no suggestion what such an instruction might have said (no pattern instruction covers the point) or how he was harmed by its omission, given Mr. Wilber's cross-examination of Ms. Palomin on the topic.[5] Finally, Mr. Peoples says Mr. Wilber should have filed more pretrial motions, but does not say what should have been filed, or how the failure to file more motions harmed him.

Mr. Peoples, then, has fallen far short of overcoming the presumption of effective assistance, by showing that Mr. Wilber's performance through trial fell below an objective standard of reasonableness.

Mr. Peoples also contends that Mr. Wilber was ineffective because he should have filed a timely motion for a new trial. Some time shortly after trial, Mr. Wilber visited Mr. Peoples in the county jail, and Mr. Peoples told Mr. Wilber of statements Mr. Peoples was collecting of inmates to whom Mr. Peoples's co-defendants had made statements. The number of such statements available at that point cannot be stated with certainty; Mr. Peoples's testimony varied between his direct and cross examinations, and no corroboration exists for either version. In any event, though, Mr. Peoples had one or more statements from inmates who said that one of Mr. Peoples's co-defendants—Mr. Rojas, Mr. Flores, or Mr. Casarez—had talked of the robberies and never mentioned involvement by a fourth person such as

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[5] In response to Mr. Wilber's cross-examination questions, Ms. Palomin testified (in contrast to her direct testimony) that she falsely told the grand jury that Robert Rojas had not spoken to her about bank robberies, and that Bobby Casarez never said anything about bank robberies. Ms. Palomin testified that she had not been charged with perjury for lying to the grand jury. The jury was fully aware of the truthfulness of Ms. Palomin's grand jury testimony.

Mr. Peoples, and occasionally mentioned lying about an African-American man that Mr. Flores thought was sleeping with Mr. Flores's girl friend.

Since that meeting with Mr. Wilber (and since the expiration of the unextended seven-day deadline for filing Rule 33 motions), Mr. Peoples has collected more such statements. One such inmate, Ricky Collins, testified at the November 12 hearing that Mr. Casarez had told him of the robberies in February with no mention of Mr. Peoples. Mr. Peoples wishes to present testimony from three other inmates about similar statements.

Mr. Wilber testified that he told Mr. Peoples that a post-trial motion on the basis of statements then known would have been cumulative. At trial, Mr. Wilber presented the testimony of county jail inmate Todd Williams, who told the jury that Mr. Flores had discussed his case with quite a few people in the jail, and never mentioned more than three people being involved, and never mentioned the name of Robin Peoples.

Mr. Wilber's decision not to file a post-trial motion on the basis of such statements did not fall below an objective standard of reasonableness. The motion would have failed, as is discussed more fully below, because the newly discovered evidence was merely impeaching, would not have led to a different result, and was not surprising.

The court has, frankly, extended the law of this circuit to allow Mr. Peoples to present his motion. Under the law as understood in this circuit, a Rule 33 motion may be raised late if based on ineffective assistance, but only if the facts making the assistance ineffective were not known to the defendant at trial, U.S. v. Brown, 742 F.2d 363,368 (7th Cir. 1984); U.S. v. Ellison, 557 F.2d 128, 133 (7th Cir. 1977), and with the exception of the newly discovered evidence (which may be raised after the seven days in any event, United States v. Washington, 184 F.3d 653, 659 (7th Cir. 1999)), Mr. Peoples knew of each of his objections to Mr. Wilber's performance at trial. Other considerations might apply if Mr. Peoples's

right to file such a motion failed because of alcohol use or unjustifiable inaction by his attorney,[6] but there is no credible evidence to support such a theory.

Once it is found, as the court now has found, that no shortcoming on Mr. Wilber's part caused the pending Rule 33 motion not to be filed in a timely manner, Mr. Peoples is left with no argument against the government's contention that except insofar as it raises newly discovered evidence, the motion is too late to be considered. Mr. Peoples's motion for new trial is untimely as to Mr. Wilber's trial and pretrial performance and as to the risk of prejudice that Mr. Peoples (and only Mr. Peoples) perceives with respect to juror Ball.

None of the inmates' statements, whether acquired before or after the Rule 33 deadline, support a new trial on the basis of newly discovered evidence. Ordinarily, one seeking a new trial on such grounds must show that (1) the evidence was discoverable only after trial, (2) the evidence was not discoverable upon the exercise of due diligence, (3) the evidence is material and not merely impeaching or cumulative, and (4) the evidence is likely to produce an acquittal. United States v. Kamel, 965 F.2d 484, 490 (7th Cir. 1992). At least some of the inmates' statements relate statements made by the co-defendants after trial, so the first two prongs are satisfied. The third point cannot be met, however; none of the statements would be admissible for any purpose other than impeachment. Statements in which

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[6] Even if the law were extended this far, it is far from clear that such attorney inaction would have cost Mr. Peoples the opportunity to raise these issues. The matters raised today (other than the later reports from other inmates) were known personally to Mr. Peoples, who also knew Mr. Wilber intended no motion for new trial. Some defendants would be deterred from making their concerns known under such circumstances, but it doesn't seem that Mr. Peoples is such a defendant. Before the time for the motion had elapsed, Mr. Peoples already had telephoned (and spoken personally with) the newspaper reporter who covered his case, and Mr. Peoples eventually wrote to the court with his concerns on the eve of sentencing. Mr. Peoples knew how to express his concerns other than through Mr. Wilber, and did so.

Mr. Peoples's alleged confederates spoke of the robberies without mention of Mr. Peoples would be admissible as "impeachment by omission," *see* Moylan v. Meadow Club, Inc., 979 F.2d 1246, 1249-1250 (7th Cir. 1992), but could not survive a hearsay objection for any purpose other than impeachment. Similarly, statements in which an alleged confederate spoke of having lied about Mr. Peoples, or having planned to lie about Mr. Peoples, would be admissible only as prior inconsistent statements, and could not survive a hearsay objection if offered for any other purpose.[7]

Second, the court does not believe that the inmates' testimony, even if the court considers the testimony of all four of the witnesses Mr. Peoples called or wants to call in support of his motion, is likely to lead to an acquittal. The government presented a very strong case against Mr. Peoples at trial, consisting of eyewitness testimony (and not solely from bank robbers) and powerful circumstantial evidence. That a confederate failed to give Mr. Peoples his due when recounting the robberies would be virtually meaningless. Evidence that a confederate bragged of framing Mr. Peoples[8] would be more damaging to the government's case, but the government's case did not rely wholly on the testimony of any one or two of the confederates. The damage would be slight.

The Seventh Circuit occasionally employs a different test for newly discovered evidence when the new evidence

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[7] Compare Fed. R. Evid. 801(d)(1)(A) ("A statement is not hearsay if ... The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ...."). None of the confederates' statements to the inmates are alleged to have been given under oath.

[8] Fabian Garza's affidavit indicates that he would testify to such a statement by Mr. Rojas. Dennis Brown's affidavit indicates that he would testify that Mr. Rojas and Mr. Casarez told him that Mr. Flores had framed Mr. Peoples.

indicates that a government witness lied at trial.[9] The movant must: (1) leave the court reasonably well satisfied that testimony from a material witness was false, (2) show that the jury might have reached a different conclusion had it known the testimony was false, or had the testimony been excluded, and (3) show that the movant was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. United States v. Fruth, 36 F.3d 649, 652 (7th Cir. 1994); Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928). Mr. Peoples's evidence cannot satisfy that test, either, because he was not surprised by the trial testimony of the persons implicated by the new evidence—Mr. Flores, Mr. Casarez, and Mr. Rojas. Through pretrial discovery, Mr. Wilber and Mr. Peoples knew that those three witnesses were going to implicate Mr. Peoples at trial.[10] There was no surprise, so no new trial is appropriate under this test, either.

It may be inappropriate to resolve an inquiry under the Larrison test simply with reference to the element of surprise, *see* United States v. Liebowitz, 919 F.2d 482, 484 (7th Cir. 1990) ("But why the defendant should be required to demonstrate surprise in every case of recantation baffles us.... The tendency of judicial language to become ossified in rules

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[9] The Seventh Circuit recognizes still another test when the government is said to have used perjured testimony to obtain a conviction. As most recently explained in United States v. Griffin, No. 98-4016, 1999 WL825359, at *5 (7th Cir. Oct. 14, 1999), one claiming a new trial on such grounds must establish "'(1) that the prosecution indeed presented perjured testimony, (2) that the prosecution knew or should have known of the perjury, and (3) that there is some likelihood that the false testimony impacted the jury's verdict.'" Mere inconsistencies in testimony of government witnesses, which is all that Mr. Peoples's newly discovered evidence would create, "'do not establish the government's knowing use of false testimony'..." Id., quoting United States v. Magana, 118 F.3d 1173, 1191 (7th Cir. 1997), cert. denied, 118 S. Ct. 1104 (1998).

[10] At the November 12 hearing, after several non-responsive answers that seemed to be designed to avoid the question, Mr. Peoples finally admitted such knowledge, though he steadfastly (and unconvincingly) claimed that he did not know how they would implicate him.

is a familiar one, and it is illustrated by the promotion of surprise from a factor bearing on the acceptance of a recantation to an absolute requirement of such acceptance. We have found only one case in which absence of surprise alone barred acceptance of an otherwise truthful-seeming recantation—and that was a doozy."), so the court continues the Larrison analysis. Even apart from surprise, Mr. Peoples has not (even if the court assumes that his 'remaining witnesses would testify in accordance with their affidavits) left the court "reasonably well satisfied" that Mr. Flores, Mr. Casarez and/or Mr. Rojas testified falsely about Mr. Peoples's participation in the four charged bank robberies.

Mr. Peoples was not denied effective assistance of counsel. His motion for new trial is untimely except with respect to his claim with respect to prospective inmate witnesses, and those inmate statements do not warrant a new trial for newly discovered evidence. The court DENIES the defendant's motion for new trial (filed August 13, 1999).

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[April 11, 2001]

00-1106

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBIN PEOPLES,
Defendant-Appellant.

Before EASTERBROOK, RIPPLE, and WILLIAMS, Circuit Judges.

ORDER

A federal jury convicted Robin Peoples of various offenses relating to his participation in four bank robberies. The district court sentenced him to over 100 years' imprisonment. Peoples appeals his convictions and sentence. We affirm.

I

In a twelve-count indictment, the government charged Peoples and three co-defendants with robbing four separate banks on different dates. During each of the robberies, the government alleged that Peoples had used a firearm, namely, a Tech-9 assault weapon and set fire to two stolen vehicles that were used in the bank robberies. While his co-defendants pled guilty to the charged offenses, Peoples opted to go to trial. Peoples, testifying in his own defense, denied any

involvement in the robberies. Convinced by the government, however, the jury convicted Peoples on all twelve counts of the indictment.[1]

Before his sentencing, Peoples filed a motion for appointment of new counsel, which the district judge granted. Peoples also filed a motion for a new trial. In support of the motion, Peoples argued that he had newly discovered evidence supporting his innocence and that he was denied effective assistance of counsel. The district judge denied the motion and sentenced Peoples to 1,329 months' imprisonment.[2]

On appeal, Peoples first argues that the district court constructively amended the indictment with respect to the firearms charges brought under 18 U.S.C. §924(c). Specifically, he contends that based on trial evidence, prosecutorial argument, and the district court's instructions to the jury, the jury might have convicted him for using a BB gun, rather than the Tech-9 charged in the indictment. Peoples next claims that the prosecutor made improper and prejudicial remarks during rebuttal that infringed on his right not to testify. Peoples also asserts that he is entitled to a new trial based on newly discovered evidence and the ineffectiveness of his trial counsel. Finally, Peoples contends that the length of his sentence violates the double jeopardy

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[1] Peoples was convicted of four counts of armed bank robbery in violation of 18 U.S.C. §2113(d), four counts of using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §924(c), two counts of using fire to commit a federal felony in violation of 18 U.S.C. §844(h), and two counts of destroying a vehicle by means of fire in violation of 18 U.S.C. §844(i).

[2] The judgment recited a term of 1,329 months' imprisonment, but, because of a clerical error, the sentencing range was incorrectly identified in the judgment. After discovering the error, the district court, on its own motion, issued an order indicating its intent to correct the error. Both parties agree that Peoples was to be sentenced to a total of 1,329 months' imprisonment. Therefore, we accept this total for purposes of the appeal. The district court may correct the clerical error on remand pursuant to Federal Rule of Criminal Procedure 35(a).

clause of the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment.

II

A. The Indictment

Peoples argues that the indictment was constructively amended in two ways, by: (1) the government's presentation of evidence and argument before the jury that two guns were used in the robberies; and (2) the jury instructions which did not reference the firearm he was charged with using. Because Peoples failed to raise this issue before the trial court, we review only for plain error. *United States v. Baker*, 227 F.3d 955, 963 (7th Cir. 2000); *United States v. Ramirez*, 182 F.3d 544, 547 (7th Cir. 1999). A plain error is one that seriously affects the "fairness, integrity, or public reputation of judicial proceedings" and affects "substantial rights." *Ramirez*, 182 F.3d at 547. To rise to the level of plain error, a constructive amendment "must constitute a mistake so serious that but for it the defendant probably would have been acquitted." See *Baker*, 227 F.3d at 963 (internal citation omitted).

Peoples was indicted for "knowingly using and carrying a firearm, to wit: a Tech-9 assault weapon, during and in relation to a crime of violence" in violation of 18 U.S.C. §924(c). At trial, one of Peoples's co-defendants testified that a BB gun was used in two of the robberies. During closing argument, the prosecutor asserted that Peoples "was the one who wielded the Tech-9 assault weapon, perhaps the most frightening of the 2 weapons in the bank." Peoples claims that the jury could have found him guilty based on the use of the BB gun in the robberies rather than the Tech-9. This argument is without merit.

Peoples was convicted of four counts of using or carrying a firearm. He stipulated that the Tech-9 was displayed and brandished during each of the four robberies, and did not object to the inclusion of this stipulation in the court's instructions to the jury. He argued that he did not use either

of these weapons. However, his co-defendant Casarez testified that Peoples wielded the Tech-9 during each robbery. With this kind of evidence linking Peoples to the Tech-9 we cannot say that the prosecutor's reference to a second gun constitutes a mistake so serious that but for it the defendant probably would have been acquitted. *See Baker*, 227 F.3d at 963.

Peoples's second constructive amendment argument likewise fails. The court instructed the jury that "the government must prove ... that the defendant knowingly used or carried *a* firearm." Jury Instr. 13 (emphasis added). A copy of the indictment (which specifically identified the Tech-9) was given to the jury for its deliberations and there was substantial evidence linking Peoples to the Tech-9. Even if the jury instructions did reference the Tech-9, Peoples could have been convicted of using and carrying a firearm. Accordingly, we find no plain error. *See id.*

B. Prosecutor's Rebuttal Remarks

Peoples next argues that, during rebuttal, the prosecutor made an impermissible remark regarding the defense's ability to present evidence and call witnesses. The prosecutor said:

> You saw that the defense has subpoena power, just like the government. And it's true, they have no burden to come forward with the case. But when they do, you ought to remember that they have the power to bring witnesses and records.

According to Peoples, the challenged remark amounted to a "direct slap" on his failure to present any evidence and alerted jurors of "the possibility that [he] had some witness under his control [who] was not called in his defense." The government claims that the prosecutor made the remark in direct response to defense counsel's argument that the government had failed to call certain witnesses that the defense had to call as part of its case. Because Peoples failed to object to the remark at trial, the plain error standard applies. See *United States v. Olano*, 507 U.S. 725, 732-34, 123 L. Ed. 2d 508, 113 S. Ct.

1770 (1993). We find no error under this exacting standard. A prosecutor may point out the defense's subpoena power, as the government's lawyer did here. See *United States v. Aldaco*, 201 F.3d 979, 988-89 (7th Cir. 2000) (noting "it is not improper for the prosecutor to make clear to the jury that defendant, like the government, has the power to subpoena any witness or witnesses relevant to case").

C. Motion for New Trial

1. Ineffective Assistance of Counsel

In a five-sentence argument, Peoples claims that his trial counsel was ineffective because he was under the influence of alcohol and he failed to follow Peoples's instructions concerning his defense at trial. During a hearing conducted by the district court, Peoples testified that on at least one occasion during the twelve-day trial he thought he smelled alcohol on his counsel's breath. Another witness testified that she thought she smelled alcohol on defense counsel's breath on two occasions at trial. Also, there was evidence in the record that on one evening after trial, Peoples's counsel drank two beers near midnight. Peoples further alleged that his counsel failed to follow a number of Peoples's directives pertaining to his defense, such as, objecting to "misleading" statements by the prosecutor during closing argument. Notwithstanding this evidence, the district court, in a well-reasoned opinion (see Memorandum and Order of November 15, 1999), denied Peoples's ineffective assistance of counsel claim. In doing so, the court gave little or no weight to People's [sic] allegations that he received subpar representation from his trial counsel. Peoples points to no fundamental flaw in the district court's analysis, and our review reveals none. Because we agree with the district court that the record contains no evidence demonstrating that trial counsel rendered substandard assistance or caused actual prejudice to Peoples's defense, see *Strickland v. Washington*,

466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), we find no error in the denial of Peoples's motion for new trial.

2. Newly Discovered Evidence

Peoples contends that the district court erred in rejecting his alternate ground for requesting a new trial, the existence of newly discovered evidence. In post-trial proceedings, Peoples presented affidavits from jail inmates who allegedly had contact with Peoples's co-defendants while they were incarcerated. Several inmates averred that Peoples's co-defendants never mentioned any involvement by a fourth person (namely, Peoples) while discussing the robberies, and other inmates indicated that they heard two of Peoples's co-defendants say they were lying about an African-American man (Peoples) being involved in the robberies. Peoples contends that the inmates' statements provided sufficient new evidence to warrant a new trial. The district court disagreed and denied the motion (see Memorandum and Order of November 15, 1999). The court found that the inmates' statements were merely cumulative and would not have led to a different verdict. The court noted that as part of his defense, Peoples presented the testimony of one inmate who made statements similar to those made in the affidavits Peoples offered as new evidence. The district court correctly determined that Peoples was not entitled to a new trial on the basis of the inmates' statements.

D. Sentencing Challenge

Peoples finally contends that his 1,329 month sentence violates the Double Jeopardy Clause of the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment. In support of his Eighth Amendment challenge, Peoples submits that the sentence exceeds his life expectancy. He acknowledges, however, that this court has made clear that lengthy prison sentences, even those beyond the life expectancy of convicted defendants, do not violate the Eighth Amendment's prohibition against cruel and unusual

punishment where they are based on proper application of the sentencing guidelines and statutorily mandated consecutive terms. See, e.g., *United States v. Martin*, 63 F.3d 1422, 1432 (7th Cir. 1995) (citing *United States v. O'Driscoll*, 761 F.2d 589, 599 (10th Cir. 1985) ("A sentence of imprisonment for a very long term of years, the effect of which is to deny a prisoner eligibility for parole until a time beyond his life expectancy, does not violate the Eighth Amendment prohibition of imposition of cruel and unusual punishment.")). We find no Eighth Amendment violation here.

As to his challenge under the Double Jeopardy Clause of the Fifth Amendment, Peoples claims that he has twice been put in jeopardy because the use of firearms in the robberies he committed was twice relied on to enhance his sentence under 18 U.S.C. §§924(c) and 2113(d). We have rejected similar arguments previously, and nothing compels us to find a Fifth Amendment double jeopardy violation here. See *United States v. Handford*, 39 F.3d 731, 734-35 (7th Cir. 1994) (noting "Congress intended that punishment pursuant to [18 U.S.C.] §924(c) be imposed upon a defendant in addition to an enhanced punishment imposed pursuant to a conviction for a crime of violence"; and further stating that "the Double Jeopardy Clause has nothing to do with a legislative determination that lengthy prison time, even imposed pursuant to two separate statutes, is the proper punishment").

III

For the foregoing reasons, we AFFIRM the judgment of the district court, but REMAND to allow the district court to correct the clerical error in the judgment.

SUPREME COURT OF THE UNITED STATES

[October 1, 2001]

01-6020

ROBIN PEOPLES,
Petitioner,

v.

UNITED STATES.

Case below, 6 Fed.Appx. 386.

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[August 10, 2001]

3:98-CR-0055(3)

UNITED STATES OF AMERICA

v.

ROBIN L. PEOPLES

Robert L. Miller, Jr., Judge

MEMORANDUM AND ORDER

Robin Peoples was found guilty by a jury of several charges arising from a series of four bank robberies on January 26, 1999. Several things of importance to the case occurred after that, but most importantly for today's ruling, no motion for new trial was filed within the seven working days after the verdict was returned, and no extension of the deadline was granted. The case is now before the court on Mr. Peoples' third motion for a new trial under Federal Rule of Criminal Procedure 33, his request for an evidentiary hearing, his motion for appointment of counsel, his motion for appointment of funds to obtain an expert witness and private investigator, his motion to supplement his motion for a new trial, his request for permission to file an addendum to his designation of materials, his motion to extend time to file a reply to the government's response to his motion for a new trial, his motion for discovery, his motion to verify, and his

motion for a 30-day extension for time to reply to the government's objection to his motion for discovery.

The court must deny Mr. Peoples' motion for appointment of counsel and for funds to obtain an expert witness and private investigator. Once the direct appeal has been decided, as it has in this case, the right to counsel no longer applies. *See* Kitchen v. United States, 227 F.3d 1014, 1018 (7th Cir. 2000) (citing Pennsylvania v. Finley, 481 U.S. 551, 557 (1987); United States v. Gramley, 915 F.2d 1128, 1137 (7th Cir. 1990) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.")). Mr. Peoples has not provided sufficient evidence, here in his *pro se* application for a new trial or in the previous application submitted by his attorney Martin Kus, on which a motion for a new trial could reasonably be predicated, much less granted.[3] The interests of justice do not necessitate appointment of counsel or funds, so the court declines to do so.

The court also denies Mr. Peoples' motion for discovery. Federal Rule of Criminal Procedure Rule 12(b) requires requests for discovery under Rule 16 to be raised before trial. *See also* Farnell v. Solicitor-General of the United States, 429 F.2d 1318, 1318 (5th Cir. 1970) (holding that motions for discovery and inspection of documents and for suppression of evidence made after conviction were too late).

The court conducted an evidentiary hearing on Mr. Peoples' second motion for a new trial on November 12, 1999, and denied the motion on November 15, 1999, finding that Mr. Peoples was not denied effective assistance of counsel, that his motion for new trial was untimely except with respect to his claim relating to prospective inmate

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[3] It should be noted that on May 30, 2001, the Seventh Circuit granted the motion of attorney Kus to withdraw as counsel for Mr. Peoples and denied Mr. Peoples's motion for appointment of counsel, advising that Mr. Peoples "is responsible for any further proceedings in this matter, including the filing of a petition for writ of certiorari with the Supreme Court. The court will not appoint new counsel."

witnesses, and those inmate statements did not warrant a new trial for newly discovered evidence. Mr. Peoples' third motion for a new trial, which raises many of the same issues and evidence offered in support of his second motion for a new trial, must also be denied.

As discussed in the court's ruling on Mr. Peoples' second motion for a new trial, none of the inmates' statements that Mr. Peoples now offers support his request for a new trial on the basis of newly discovered evidence. One seeking a new trial on such grounds must show that (1) the evidence was discoverable only after trial, (2) the evidence was not discoverable upon the exercise of due diligence, (3) the evidence is material and not merely impeaching or cumulative, and (4) the evidence is likely to produce an acquittal. United States v. Kamel, 965 F.2d 484, 490 (7th Cir. 1992). Mr. Peoples offers the affidavits or letters of Keith Denberg, Jason Nordyke, James Brown, Dennis Brown, Glen Brown, and Joe Masserano. Some of the inmates' statements relate statements made by the co-defendants after trial, so the first two prongs are satisfied. The third point cannot be met, though, because none of the statements would be admissible for any purpose other than impeachment. Statements in which Mr. Peoples' alleged confederates spoke of the robberies without mention of Mr. Peoples would be admissible as "impeachment by omission," *see* Moylan v. Meadow Club, Inc., 979 F.2d 1246, 1249-1250 (7th Cir. 1992), but could not survive a hearsay objection if offered for any purpose other than impeachment. Similarly, statements in which an alleged confederate spoke of having lied about Mr. Peoples, or having planned to lie about Mr. Peoples, would be admissible only as prior inconsistent statements, and could not survive a hearsay objection if offered for any other purpose.[4]

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[4] Compare Fed. R. Evid. 801(d)(1)(A) ("A statement is not hearsay if ... The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony, and was given under oath

Second, the inmates' testimony would be unlikely to lead to an acquittal. The government presented a very strong case against Mr. Peoples at trial, consisting of eyewitness testimony (and not solely from bank robbers) and powerful circumstantial evidence. That a confederate failed to give Mr. Peoples his due when recounting the robberies would be virtually meaningless. Evidence that a confederate bragged of framing Mr. Peoples would be more damaging to the government's case, but the government's case did not rely wholly on the testimony of any one or two of the confederates. The damage would be slight.

The Seventh Circuit occasionally employs a different test for newly discovered evidence when the new evidence indicates that a government witness lied at trial.[5] The movant must (1) leave the court reasonably well satisfied that testimony from a material witness was false, (2) show that the jury might have reached a different conclusion had it known the testimony was false, or had the testimony been excluded, and (3) show that the movant was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. United States v. Fruth, 36 F.3d 649, 652 (7th Cir. 1994); Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928). Mr. Peoples' evidence cannot satisfy that test, either, because he was not surprised

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subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition...."). None of the confederates' statements to the inmates are alleged to have been given under oath.

[5] The Seventh Circuit recognizes still another test when the government is said to have used perjured testimony to obtain a conviction. As most recently explained in United States v. Griffin, 194 F.3d 808, 818 (7th Cir. 1999), one claiming a new trial on such grounds must establish "'(1) that the prosecution indeed presented perjured testimony, (2) that the prosecution knew or should have known of the perjury, and (3) that there is some likelihood that the false testimony impacted the jury's verdict.'" Mere inconsistencies in testimony of government witnesses, which is all that Mr. Peoples' newly discovered evidence would create, "'do not establish the government's knowing use of false testimony'..." Id. (quoting United States v. Magana, 118 F.3d 1173, 1191 (7th Cir. 1997), cert. denied, 118 S. Ct. 1104 (1998)).

by the trial testimony of the persons implicated by the new evidence—Mr. Flores, Mr. Casarez, Mr. Rojas, and Ms. Carrington. Through pretrial discovery, Mr. Peoples and his attorney Kenneth Wilber knew that those witnesses were going to implicate Mr. Peoples at trial. There was no surprise, so no new trial is appropriate under this test, either.

It may be inappropriate to resolve an inquiry under the Larrison test simply with reference to the element of surprise, *see* United States v. Liebowitz, 919 F.2d 482, 484 (7th Cir. 1990), so the court continues the Larrison analysis. Even apart from surprise, Mr. Peoples has not left the court "reasonably well satisfied" that Mr. Flores, Mr. Casarez, Mr. Rojas and/or Ms. Carrington testified falsely about Mr. Peoples' participation in the four charged bank robberies.

The remainder of the evidence that Mr. Peoples offers—the recall notice on the Chrysler, the newspaper clippings regarding the weather, and other things—are not evidence that was discoverable only after trial. This evidence was discoverable upon the exercise of due diligence, this evidence has very minimal materiality, and, most importantly, the evidence is not at all likely to produce an acquittal were Mr. Peoples retried.

In his reply to the government's response to his motion for a new trial, Mr. Peoples also seeks to add additional evidence in support of contention that his trial counsel, Mr. Wilber, failed to provide effective assistance. The court already has sufficiently addressed Mr. Peoples' claims concerning his trial counsel, and concluded that Mr. Peoples received effective assistance as required by the Sixth Amendment. Recognizing a strong presumption that counsel rendered reasonably effective assistance, Mr. Wilber's performance exceeded any objective standard of reasonableness; and Mr. Peoples has come far short of demonstrating that but for any unprofessional error Mr. Wilber is alleged to have committed, the result of the proceeding would have been different. *See* Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Mr. Peoples also attempts to make much of

Mr. Wilber's suicide, which occurred long after Mr. Wilber's representation of Mr. Peoples ended; while tragic, the suicide has virtually no probative value here.

Once it is found, as the court found on November 15, 1999, that no shortcoming on Mr. Wilber's part caused a Rule 33 motion not to be filed in a timely manner, Mr. Peoples is left with no argument against the government's contention that, except insofar as it raises newly discovered evidence, the motion, like much of Mr. Peoples' second motion for a new trial, is too late to be considered. Mr. Peoples' motion for new trial is untimely under Rule 33 as to Mr. Wilber's trial and pretrial performance and as to the risk of prejudice that Mr. Peoples (and only Mr. Peoples) perceives with respect to various jurors.

A clerical error was made in sentencing Robin Peoples on December 26, 1999. The court announced its intention to sentence Mr. Peoples at the mid-point of the applicable sentencing range—189 months in a range of 168 to 210 months—but the judgment (taking its language directly from the sentencing memorandum prepared by this court) reflects entry of a bottom of the range sentence, or 168 months. The error is not as obvious as it might seem, however, because the sentencing guidelines direct the sentence only with respect to six of the twelve counts of conviction. Mandatory consecutive sentences totaling 95 years, or 1,140 months, govern the rest of the counts, converting Mr. Peoples' effective sentencing range to 1,308 months to 1,350 months. The judgment (again, with language taken directly from the sentencing memorandum) purports to impose "a total term of 1,329 months' imprisonment," but also purports to impose a sentence of 168 months on the six guideline counts. Careful addition discloses that the months add up to 1,308 rather than 1,329 months—the low end of the range instead of the middle of the range.

Pursuant to the Court of Appeals' remand of this case on April 11, 2001, and pursuant to Federal Rule of Criminal Procedure 35(a), the court MODIFIES the sentencing order to

provide for a sentence of 189 months on each of counts 1, 4, 5, 8, 9 and 11, to be served concurrently with each other, but to be served consecutively to all other terms.

In conclusion, the court GRANTS Mr. Peoples' motion to supplement his motion for a new trial [Docket No. 233]; DENIES Mr. Peoples' motion for appointment of funds to obtain an expert witness and private investigator [Docket No. 236]; DENIES Mr. Peoples' motion for appointment of counsel [Docket No. 237]; DENIES Mr. Peoples' motion for a new trial [Docket No. 238]; GRANTS Mr. Peoples' request for permission to make addendum to his designation of materials to support motion for new trial [Docket No. 242]; GRANTS Mr. Peoples' motion to extend time to file reply to government's response to the motion for a new trial [Docket No. 244]; DENIES Mr. Peoples' motion for discovery [Docket No. 250]; DENIES Mr. Peoples' request to verify claim that trial counsel provided false testimony [Docket No. 251]; GRANTS Mr. Peoples' request for an extension of 30 days to file a reply to the government's objection to the motion for discovery [Docket No. 255].

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[July 16, 2002][1]

00-1106

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBIN PEOPLES,
Defendant-Appellant.

Before EASTERBROOK, RIPPLE, and WILLIAMS, Circuit Judges.

ORDER

In this successive appeal, Robin Peoples challenges the district court's denial of his *pro se* motions for a new trial, post-trial discovery, and appointment of counsel. For the reasons given below, we affirm the district court.

Peoples was convicted on January 26, 1999, on charges arising from a series of bank robberies in late 1997 and early 1998. We affirmed Peoples's conviction and sentence on direct appeal, *United States v. Peoples*, 2001 WL 379457 (7th Cir., April 11, 2001), but remanded the case to the district

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[1] This appeal is successive to No. 00-1106 and the same panel has retained it for decision. After examining the briefs and record, we have concluded that oral argument is unnecessary. Accordingly, the appeal is submitted on the briefs and the record pursuant to Federal Rule of Appellate Procedure 34(a)(2).

court to correct a clerical error in the judgment. While his direct appeal was pending before this court, Peoples filed a motion for a new trial (his third) and a motion for appointment of counsel on November 20, 2000. On June 22, 2001, he filed a motion seeking post-trial discovery. In its order correcting the clerical error in Peoples's sentence on August 10, 2001, the district court denied these motions and Peoples now appeals.

Peoples first argues that he has the right to have counsel appointed to assist him in his post-trial motion practice, including motions for discovery and a new trial. (He has already filed his fourth motion for a new trial with the district court, which is not at issue in this appeal.) Peoples was represented at trial by appointed counsel. After trial and prior to Peoples's sentencing, a different attorney was appointed to replace trial counsel, and continued to do so until the conclusion of the direct appeal before us. Peoples challenged the effective assistance of his trial counsel in his direct appeal, and we found that his attorney did not make any errors that would warrant a new trial. Peoples now asks for a third attorney, but he has completed his direct appeals and no longer has a Sixth Amendment right to counsel. *See United States v. Kitchen*, 227 F.3d, 1014, 1018 (7th Cir. 2000).[2] Since Peoples's direct appeal was still pending, he was already represented by counsel at the time he filed his motion for appointment of counsel. Thus, the district court properly denied his motion upon the conclusion of the direct appeal before this court.

Peoples's motion for a new trial is based on "newly discovered evidence," and is a re-hash of similar arguments made during his direct appeal. Here, he argues that new witnesses will testify that government witnesses committed perjury at trial and had motives that encouraged or compelled

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[2] After we denied Peoples's direct appeal, see 2001 WL 379457, the Supreme Court denied his petition for a writ of certiorari. See Peoples v. United States, 122 S. Ct. 321 (2001).

them to testify against Peoples. As he admits in his reply brief, if a new trial was held and included this "newly-discovered" evidence, the additional evidence would only go towards impeaching the government's witnesses. Similarly, Peoples describes the possible new testimony as, at best, only increasing the possibility that he would be acquitted. This is a far cry from our standard for granting a new trial, which requires that newly-discovered evidence "*probably* lead to an acquittal in the event of retrial." *United States v. Kamel*, 965 F.2d 484, 490 (7th Cir. 1992) (emphasis added). We therefore find that the motion for a new trial was properly denied.

Peoples next claims that he received ineffective assistance of counsel, as evidenced by his attorney's failure to follow up certain investigative leads and to make certain specific objections at trial. He first raised this argument in his direct appeal, where we found that his trial attorney's performance was well within the bounds of acceptable performance. Peoples now claims that his trial attorney's mental condition rendered him unable to provide effective assistance, citing newly discovered evidence and post-trial events, including his trial attorney's tragic suicide, which occurred over a year after Peoples's trial and months after his representation of Peoples ceased. This "newly discovered" evidence is actually just behavior that should have been discussed during Peoples's direct appeal, as it amounts to errors allegedly committed during trial. We already found Peoples's trial attorney's performance satisfactory, and do not consider the "new evidence" that Peoples discusses to describe any errors serious enough to implicate his attorney's performance under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore we find that the motion for a new trial based on the ineffective assistance of counsel was properly denied.

Finally, Peoples claims that the district court incorrectly denied his motion to compel discovery. In his motion, Peoples claims that he is entitled to obtain material that would

bolster his motion for a new trial. However, discovery under Federal Rule of Criminal Procedure 12(b) is a process that takes place only *before* trial. If Peoples were to successfully present a motion for a new trial, he would be entitled to discovery. However, he has presented no evidence that would compel the former, and so cannot be granted the latter. Accordingly, the district court properly denied Peoples's motion to compel discovery.

For the reasons given, we find that Peoples's motions were properly denied and AFFIRM the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[August 19, 2002]

3:98-CR-0055 RM

UNITED STATES OF AMERICA

v.

ROBIN L. PEOPLES

Robert L. Miller, Jr., Judge

MEMORANDUM AND ORDER

Robin Peoples, proceeding *pro se*, has filed his fourth motion for a new trial under Rule 33, a motion to subpoena and conduct an *in camera* review of certain psychiatric medical records of his trial counsel, and a motion for production of transcripts; he recently requested more time to reply or alternatively permission to withdraw his Rule 33 motion. The government opposes his request for a new trial and inspection of records.

Mr. Peoples bases his Rule 33 motion on what he calls newly discovered evidence of his counsel's bouts with depression, marital strife, and substance dependency during his trial, hoping to raise the specter of ineffective assistance of counsel under the Sixth Amendment. The parties square off on whether the motion was timely and whether the motion meets the standards for a new trial articulated in United States v. Kamel, 965 F.2d 484, 490 (7th Cir. 1992), or alternatively

Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928), but the court needn't reach these tests, because Mr. Peoples's motion should be construed as a petition under 28 U.S.C. § 2255.

A "post-judgment motion in a criminal proceeding that fits the description of § 2255 para. 1 is a motion under § 2255," whether or not the defendant captioned the motion as one under Rule 33. See United States v. Evans, 224 F.3d 670, 672 (7th Cir. 2000). Mr. Peoples's motion, rather than claiming innocence, see, e.g., Ruth v. United States, 266 F.3d 658, 659-661 (7th Cir. 2001), asserts entitlement to a new trial because of ineffective assistance of counsel—a claim that his conviction or sentence violates the Constitution, and so a claim invoking the grounds of § 2255. See 28 U.S.C. § 2255 para. 1; see also United States v. Ellison, 557 F.2d 128, 133 (7th Cir. 1977) (facts known by the defendant and underlying ineffective assistance claim not newly discovered evidence).

Under such circumstances, the court "should advise the mislabeling movant that his motion may be deemed a section 2255 motion and give him a chance to withdraw it." Henderson v. United States, 264 F.3d 709,710 (7th Cir. 2001). Mr. Peoples has already filed a motion to withdraw his Rule 33 motion so he can file a § 2255 petition—relief that corresponds to Henderson and Evans—so the court now grants his motion to withdraw rather than construe his current motion as his first § 2255 petition.

Mr. Peoples has also requested a subpoena and *in camera* review of certain psychiatric medical records of his trial counsel, which pertain to his motion for new trial. Because that motion has been withdrawn, the court now denies this request as moot.

Finally, Mr. Peoples requests transcripts from the sentencing hearings that occurred on July 13 and December 16, 1999, which relate to his anticipated § 2255 petition. These transcripts have not been prepared, so 28 U.S.C. § 753(f) governs his request, which permits transcripts for § 2255 proceedings to be furnished at public expense if this

court "certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." Such a certification requires Mr. Peoples to file his § 2255 petition first, and he is not entitled to transcripts at public expense until then.[1] See United States ex rel. Davidson v. Wilkinson, 618 F.2d 1215, 1219 (7th Cir. 1980); see also United States v. MacCollom, 426 U.S. 317, 325 (1976); United States v. Groce, 838 F. Supp. 411, 415-416 (E.D. Wis. 1993).

For the foregoing reasons, the court GRANTS Mr. Peoples's motion to withdraw his Rule 33 motion [Docket No. 280]; ORDERS his motion for new trial to be shown WITHDRAWN [Docket No. 273]; DENIES AS MOOT his motion to subpoena and conduct an *in camera* review of medical records [Docket No. 272]; DENIES AS MOOT his motion to confirm filing of his Rule 33 motion [Docket No. 274]; and DENIES his motion for production of transcripts [Docket No. 277].

SO ORDERED.

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[1] Nor has Mr. Peoples been "permitted to sue or appeal in forma pauperis" through the appropriate request. 28 U.S.C. § 753(f).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[April 22, 2003]

Cause No. 3:02-CV-0704 RM
(arising from 3:98-CR-0055 RM)

ROBIN L. PEOPLES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Robert L. Miller, Jr., Chief Judge

MEMORANDUM AND ORDER

Robin Peoples, proceeding *pro se*, withdrew his fourth motion for a new trial to file a petition under 28 U.S.C. § 2255. Since then, he has filed a motion to subpoena and conduct an *in camera* review of his trial counsel's psychiatric medical records, a designation of materials supporting his collateral petition, a motion for leave to conduct discovery, a motion for appointment of counsel, and two motions to amend his § 2255 petition. The government responded to most of these motions, and after receiving two time extensions, Mr. Peoples filed his reply brief on his § 2255

petition on January 31. These matters are now ripe and taken up collectively.[1]

After more than two weeks in trial, a jury found Mr. Peoples guilty on all twelve counts of an indictment charging him with the aggravated robberies of four banks, the carrying and use of a firearm during those bank robberies, the use of fire to commit two of the robberies, and the malicious destruction of two stolen getaway vehicles by fire. Mr. Peoples was sentenced to a total of 1,329 months' imprisonment, and the court of appeals affirmed his conviction and sentence. See United States v. Peoples, 6 Fed. Appx. 386, 2001 U.S. App. LEXIS 7625 (7th Cir. April 11, 2001). After the court ruled on his myriad motions for new trial and appeals on two such motions, see id.; United States v. Peoples, 41 Fed. Appx. 875, 2002 U.S. App. LEXIS 14401 (7th Cir. July 16, 2002), Mr. Peoples filed this § 2255 petition. He advances seven grounds for relief—three of which assert his actual innocence and four of which assert ineffective assistance of counsel.

The claims of actual innocence must be dismissed. "An argument of actual innocence, based on newly discovered evidence, does not implicate the Constitution," Ruth v. United States, 266 F.3d 658, 661 (7th Cir. 2001) (citing Herrera v. Collins, 506 U.S. 390, 400-401 (1993)), so the court lacks the authority to "issue a writ of habeas corpus only on the ground that [Mr. Peoples] is, or might be, innocent."[2] Milone v.

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[1] Mr. Peoples also filed a motion for leave to file an oversized reply brief, which the court now grants. His motion to proceed with his § 2255 petition in forma pauperis is denied as moot because no filing fee need be paid.

[2] Nor is the court persuaded that Mr. Peoples's submissions-themselves—largely impeaching or cumulative—establish his actual innocence in light of the overwhelming evidence adduced at trial and marshaled in response to his earlier motions for new trial showing his irrefutable guilt. Mr. Peoples's claim of actual innocence, though dogged, ignores the totality of the evidence, see Calderon v. Thompson, 523 U.S. 538, 565 (1998), and it simply cannot be said that "no reasonable juror

Camp, 22 F.3d 693, 700 (7th Cir. 1994). As it stands now, Mr. Peoples doesn't need a claim of actual innocence to have his constitutional claims heard by a federal tribunal. See id. at 699; see also Schlup v. Delo, 513 U.S. 298, 315 (1995) (actual innocence is not a constitutional claim, "but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits").

Mr. Peoples's claims of ineffective assistance of counsel, on the other hand, are constitutional claims cognizable under § 2255. To show ineffective assistance of counsel, Mr. Peoples must demonstrate both his counsel's deficient performance and a resulting prejudice to his defense, Strickland v. Washington, 466 U.S. 668, 687 (1984); Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996), overcoming a strong presumption that his counsel provided competent representation, see United States v. Pergler, 233 F.3d 1005, 1008-1009 (7th Cir. 2000), and demonstrating errors that, not just had "some conceivable effect" on the proceedings, but establish a "reasonable probability" that the outcome would have been different without those errors. Strickland v. Washington, 466 U.S. at 693-694; accord Williams v. Taylor, 529 U.S. 362, 390-394 (2000).

Mr. Peoples alleges his trial counsel, Kenneth Wilbur, provided ineffective assistance because he had a conflict of interest; failed to investigate and call alibi witnesses; improperly stipulated to firearms being brandished during the robberies and entered into other stipulations to which Mr. Peoples had not agreed; failed to investigate and obtain evidence tending to support Mr. Peoples's credibility; failed to object to what Mr. Peoples views as improper prosecutorial vouching or to ask for a prompt curative instruction or mistrial; failed to object to prosecutorial misstatements of testimony and evidence or use of perjured testimony; failed to

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would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995).

object to improper questions posed to Mr. Peoples and others; failed to object to leading questions; failed to request a flight instruction; interjected misstatements about a co-defendant's gang involvement; and allowed his alleged depression, alcoholism, and marital strife to affect his representation. Mr. Peoples says the cumulative effect of these claimed missteps meets the Strickland standard.

The government contends the law of the case doctrine bars Mr. Peoples's ineffectiveness claims. Under that doctrine, which applies to § 2255 petitions, see Daniels v. United States, 26 F.3d 706, 712 (7th Cir. 1994); Shore v. Warden, 942 F.2d 1117, 1123 (7th Cir. 1991), once the court of appeals "has decided the merits of a ground of appeal, that decision establishes the law of the case and is binding on a district judge asked to decide the same issue in a later phase of the same case, unless there is some good reason for reexamining it." United States v. Mazak, 789 F.2d 580, 581 (7th Cir. 1986). "A defendant who complains on direct appeal about the quality of his lawyer can't try again on collateral attack unless there has been an intervening change of law," Ryan v. United States, 214 F.3d 877, 879 (7th Cir. 2000), or a discovery of new and previously undiscoverable evidence. See United States v. Taglia, 922 F.2d 413, 418 (7th Cir. 1991).

The court of appeals twice has addressed the effectiveness of Mr. Peoples's trial counsel (as has this court on various motions for new trial), and his current allegations largely mirror the arguments made in his prior appeals. The law of the case has been established in those appeals: trial counsel's "performance was well within the bounds of acceptable performance." United States v. Peoples, 2002 U.S. App. LEXIS 14401 at *4. Mr. Peoples has not shown good grounds for disregarding the law of the case, so that doctrine binds this court in considering Mr. Peoples's § 2255 petition. See Ryan v. United States, 214 F.3d at 879; Daniels v. United States, 26 F.3d at 712.

Mr. Peoples alleges in his § 2255 petition other errors he had not raised in his two prior appeals. Though at times the law of the case doctrine extends only to issues the court of appeals actually addressed, see Moore v. Anderson, 222 F.3d 280, 284 (7th Cir. 2000), in many cases, as United States v. Sumner, 2003 U.S. App. LEXIS 6592, *17-18 (7th Cir. Apr. 8, 2003), recently reaffirmed, the doctrine might well bar different litigation positions that a petitioner presents in successive appeals. See also Ryan v. United States, 214 F.3d at 878-879 (law of the case would bar different theory why a plea was involuntary from that presented in first appeal); People Who Care v. Rockford Bd. of Educ., 171 F.3d 1083, 1088 (7th Cir. 1999) (law of the case bars changed legal theories on second appeal without appropriate circumstances); United States v. Taglia, 922 F.2d 417-418 (as applied to § 2255 petitions). Because Mr. Peoples has not presented good grounds for disregarding the law of the case, that doctrine bars theories of ineffective assistance he could have offered in his prior appeals but didn't.

Mr. Peoples offers what he sees as new evidence and says his new allegations of ineffective assistance (and the old ones) accordingly survive. The "new evidence" and other "special circumstances" Mr. Peoples identifies are largely the same evidence and post-trial events he offered the court of appeals the second time it addressed his ineffective assistance of counsel claim. Taking these things as new evidence under those circumstances would be antithetical to the concept of "good grounds" needed to make the porous and flexible nature of the law of the case doctrine work in his favor. The court of appeals also said then that his "new evidence" was "actually just behavior that should have been discussed during [Mr.] Peoples's direct appeal, as it amounts to errors allegedly committed during trial." United States v. Peoples, 41 Fed. Appx. 875, 2002 U.S. App. LEXIS 14401 at *5. It wasn't new evidence then, and it certainly isn't new evidence now. Any other allusions to "special circumstances" are not sufficient to ignore the law of the case today.

The vast majority of errors Mr. Peoples newly identifies against his trial counsel pertain to counsel's performance at trial, and the facts needed to evaluate those errors would have been part of the record on direct appeal. Mr. Peoples had separate appellate counsel to present those errors (or himself in his *pro se* appeal), so Mr. Peoples could have raised these allegations then with his other allegations of attorney error. See Galbraith v. United States, 313 F.3d 1001,1007-1008 (7th Cir. 2002); United States v. Taglia, 922 F.2d 417-418. The law of the case has its own finality, but Mr. Peoples's choice not to raise these errors during his two prior appeals has the effect of procedurally defaulting his § 2255 petition. A § 2255 petition is generally the right vehicle by which to challenge counsel's assistance—true—but Mr. Peoples made that challenge in his direct appeal (and in a subsequent appeal) and could have raised then many of the other errors he advances now. He has shown neither cause (some impediment) nor prejudice (an effect on the outcome), nor a resulting fundamental miscarriage of justice, permitting him to raise these issues afresh in a § 2255 petition. See Bousley v. United States, 523 U.S. 614, 621 (1998) ("[h]abeas review is an extraordinary remedy and will not be allowed to do service for an appeal"); Barnickel v. United States, 113 F.3d 704, 706 (7th Cir. 1997) (a § 2255 petition "is not a substitute for a direct appeal"). To the extent Mr. Peoples declined to use his opportunity to present in those appeals the array of errors he claims his trial counsel made, and which he could have raised then, this § 2255 petition cannot be his substitute.

Not all the errors Mr. Peoples cites have become the law of the case or would have been part of the record on direct appeal (or perhaps in his second appeal), so he may present those errors now in his § 2255 petition. See Moore v. Anderson, 222 F.3d at 284; Galbraith v. United States, 313 F.3d at 1007-1008; United States v. Taglia, 922 F.2d 417-418. Ignoring momentarily, for example, his claims against his trial counsel, Mr. Peoples raises the ineffective assistance of his appellate counsel, Martin Kus—a claim legitimately

brought in this § 2255 petition. Much of what Mr. Peoples asserts as Mr. Kus's failures relates to what Mr. Peoples asserts as Mr. Wilber's failures—in other words, Mr. Peoples says Mr. Kus was ineffective by not raising certain aspects of Mr. Wilbur's claimed ineffective assistance—so there remains some value in discussing the allegations against both attorneys, despite the effects the law of the case or procedural default rules have.

Mr. Peoples alleges his trial counsel had a conflict of interest because he put his own monetary needs before Mr. Peoples's liberty interests. Mr. Peoples says Barbara Holt, his mother, will testify that Mr. Wilbur told her that he had less time to dedicate to Mr. Peoples's case than other cases where clients could afford to pay him. Mr. Peoples also represents that Ms. Holt will testify that Mr. Wilbur' charged her fifty dollars to take calls from Mr. Peoples without giving her a witness voucher check as he had promised and without taking most of Mr. Peoples's calls. Mr. Peoples also alleges that Mr. Wilbur told him during a visit at the M.C.C. in Chicago that he had come only so he could write the trip off under the Criminal Justice Act while Mr. Wilbur's spouse went Christmas shopping. None of these allegations in any way shows how Mr. Wilbur's performance suffered at trial, nor how the proceeding's outcome was adversely affected.

Mr. Peoples tries to draw a causal link from this alleged conflict to deficiencies he sees in Mr. Wilbur's trial strategies. None is evident. The contentions about these so-called deficiencies, including conduct related to his alibi defense, stipulations at trial, and evidence Mr. Peoples says supports his credibility, already have been presented to this court and raised on appeal—with both courts finding Mr. Wilbur's performance within acceptable bounds of assistance or without prejudice to Mr. Peoples's case—or these issues should have been raised in his first or second appeal. See Galbraith v. United States, 313 F.3d at 1007-1008. Measured then, these claims failed to meet Strickland; measured now, they fail to meet Strickland.

Mr. Peoples next says Mr. Wilbur's performance fell below the constitutional bar because he didn't object to the government's closing argument in which, Mr. Peoples argues, the government improperly vouched for witnesses. "Vouching occurs when the prosecutor injects his personal opinion about the credibility of a witness," United States v. Andreas, 216 F.3d 645, 671 (7th Cir. 2000), something not to be done lest the government's prestige unduly bolster the witness's truthfulness and lest the jury be invited "to speculate as to the existence of facts outside the adversarial process of the trial." United States v. Anderson, 303 F.3d 847, 855 (7th Cir. 2002).

Much of the closing argument to which Mr. Peoples points reveals no improper vouching. The comments made about certain witnesses' prior consistent statements were in the manner of explaining an evidentiary significance that could be attributed to these statements, not the prosecutor's personal opinion about their credibility. Mr. Peoples also says the prosecutor improperly argued to the jury that witness Bethany Quintero testified the same as she had before the grand jury about a bottle of gasoline she observed in Mr. Peoples's car and their conversation about that, but Mr. Peoples points to no such argument by the prosecutor. The only passage he cites concerns the timing of that incident, and other references to Ms. Quintero in the government's closing argument don't as much imply what Mr. Peoples says happened. Since neither of these instances amount to improper vouching, Mr. Peoples's counsel had nothing to which to object, and his assistance was consequently not unreasonably bad.

The government made other remarks during its closing argument that rest on thinner ice. The prosecutor said in rebuttal that "immunity protects the truth" and that he and others provided immunity to witnesses only after their story had been corroborated to ensure that their story amounted to the truth. In these remarks, the prosecutor referred to "we" and "us" as though suggesting he was involved in the process of investigating and corroborating these stories. Mr. Peoples

contends these remarks constituted improper vouching and violated the advocate-witness rule that prohibits prosecutors essentially from testifying when they serve as advocates. See, e.g., Petrilli v. Drechsel, 94 F.3d 325, 330 (7th Cir. 1996).

Without splitting hairs as to whether these remarks were improper, they were harmless. See United States v. Severson, 3 F.3d 1005, 1014 (7th Cir. 1993) (similar remarks found harmless under five factors to consider). The remarks were not in their nature serious, they were invited by defense counsel's attempts to bolster Mr. Peoples's defense, and the great weight of the evidence stood against Mr. Peoples. See id. at 1014-1015. Since the remarks were harmless, it was not unreasonable for Mr. Wilbur not to have objected, and perhaps as often is the case, a rational strategic decision on his part that should not be second-guessed. See United States v. Zarnes, 33 F.3d 1454, 1473 (7th Cir. 1994). In any event, a harmless error by definition is not one that would have had a reasonable probability of changing the trial's outcome, so Mr. Peoples has not met his Strickland burden.

Mr. Peoples argues other prosecutorial misconduct—misstatements of evidence, use of perjured testimony, improper questioning—and his trial counsel's concomitant failure to object to this alleged misconduct. The facts surrounding these contentions, much like his arguments regarding improper vouching, would have been intrinsic to the trial record, so he should have raised all these claims in either one of his first two appeals, see Galbraith v. United States, 313 F.3d at 1007-1008; Bousley v. United States, 523 U.S. at 621; Barnickel v. United States, 113 F.3d at 706, just as did with other arguments about the prosecutor's conduct and his trial counsel's performance. See United States v. Peoples, 41 Fed. Appx. 875, 2002 U.S. App. LEXIS 14401 at *3; United States v. Peoples, 6 Fed. Appx. 386, 2001 U.S. App. LEXIS 7625 at *8-10. Mr. Peoples's arguments nonetheless would not show a violation of Strickland.

Much of what Mr. Wilbur did or didn't do presents issues Mr. Peoples claims Mr. Kus should have raised. Mr. Peoples

says he received ineffective assistance both at the hearing on his second motion for a new trial and during his first appeal. Mr. Peoples first contends that Mr. Kus, who Mr. Peoples claims was friends with Mr. Wilbur, said he would not file an ineffective assistance claim against Mr. Wilbur. Whether this statement was made is of no consequence since Mr. Kus presented such a claim, and ably so given the circumstances, both on a motion for new trial and on appeal. Mr. Peoples has shown no deficiency in his appellate attorney's performance or any prejudice to his case.

Mr. Peoples also says Mr. Kus neglected to present evidence of Mr. Wilbur's alleged alcoholism and other personal problems. The court of appeals already has considered this evidence and said it did not demonstrate ineffective assistance of counsel under Strickland, see United States v. Peoples, 41 Fed. Appx. 875, 2002 U.S. App. LEXIS 14401 at *4-5, so Mr. Peoples has shown no prejudice arising from Mr. Kus having not presented this contention in an earlier appeal. Mr. Peoples moves to subpoena and conduct an *in camera* review of Mr. Wilbur's psychiatric medical records from various treatment centers to support this argument, but since he hasn't shown Mr. Wilbur's performance to have fallen below acceptable standards or a prejudice to his defense, Mr. Peoples has no need to conduct a fishing expedition into otherwise privileged records that have no continuing relevance to his ineffective assistance of counsel claim.

Mr. Peoples next argues that Mr. Kus failed to present what Mr. Peoples sees as evidence showing Mr. Wilber committed perjury, including visitation records he says show Mr. Wilbur had not visited him within seven days after the guilty verdict as Mr. Wilbur said at the hearing on Mr. Peoples's motion for new trial. Such a fact, even if true, has not been shown to prejudice Mr. Peoples's case. Mr. Peoples presented no grounds to justify Rule 33 relief—indeed, his three attempts at that relief failed—so that Mr. Wilbur might not have met with Mr. Peoples until after

the seven days for filing such a motion had passed has no obvious value other than merely to impeach Mr. Wilbur's testimony at the hearing. Impeachment on this point would not have had the effect of justifying a new trial.

Mr. Peoples also says Mr. Kus erred by not presenting Mr. Wilbur's alleged perjury in testifying that he gave Mr. Peoples a copy of the presentence investigation report during a visit at the M.C.C. Mr. Peoples submits a copy of the M.C.C.'s legal mail logbook, but nothing about that exhibit shows Mr. Wilbur's testimony to have been false. Also, Mr. Peoples admitted at sentencing that he had reviewed that report and he presented objections, so he has not shown how his case was hampered by not obtaining a copy of that report sooner, even if his allegation were true. That said, his appellate counsel had nothing to present on this point, and Mr. Peoples was denied neither the effective assistance of counsel nor due process.

Mr. Peoples claims Mr. Kus failed to raise other issues on direct appeal including Mr. Wilbur's alleged conflict of interest, Mr. Wilbur's alleged misfeasance in not objecting to prosecutorial misconduct, and a denial of due process because of prosecutorial misconduct and perjured testimony. These allegations already have been addressed; Mr. Kus had no good basis on which to present these issues within the context of ineffective assistance of counsel or due process. Mr. Kus should be commended, not criticized, for attempting to sort out the chaff in Mr. Peoples's appeals. See, e.g., Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) ("only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome"); Page v. United States, 884 F.2d 300, 302 (7th Cir. 1989) (appellate counsel must winnow potential claims "so that the court may focus on these with the best prospects").

Mr. Peoples says Mr. Kus should have argued the constructive amendment of six counts of the indictment. Mr. Kus presented such an argument as to other counts of the indictment, and the court of appeals easily dispatched these

arguments. See United States v. Peoples, 6 Fed. Appx. 386, 2001 U.S. App. LEXIS 7625 at *4-7. Mr. Peoples provides no details in his § 2255 petition for the argument he now says his appellate counsel should have made, and conclusory the argument is insufficient to warrant § 2255 relief. See United States v. Limehouse, 950 F.2d 501, 503 (7th Cir. 1991) (conclusory allegations do not satisfy Strickland).

Mr. Peoples has filed two motions to amend his § 2255 petition, one of which would attempt to cure the conclusory nature of this last argument. Under 28 U.S.C. § 2242, a petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions," meaning leave to file an amended petition "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). Neither motion to amend should be granted under this standard.

The first motion to amend is not properly before the court because Mr. Peoples failed to certify service on the government, even after the government logged its objection, and in any event would not be warranted because it futilely contains only more conclusory, unsupported, or unavailing claims of actual innocence or ineffective assistance of counsel—most of which have already been addressed as part of his original petition. See, e.g., Campania Mgmt. Co. v. Rooks, Pitts & Poust, 290 F.3d 843,849 (7th Cir. 2002) (futile amendments need not be granted).

The second motion to amend attempts to offer the basis for Mr. Peoples's contention that his appellate counsel should have argued the constructive amendment to the four counts of aggravated bank robbery on direct appeal. He says instruction number twelve—the instruction providing the elements for proving aggravated bank robbery—omitted "firearm" in identifying the "dangerous weapon or device" the indictment specified, which broadened the offense charged. He also says by allowing the jury to consider a BB gun as a dangerous weapon or device, in addition to the Tech-9 assault weapon charged in other counts of the indictment, the indictment was impermissibly amended.

Mr. Peoples posed very similar argument on direct appeal as to other counts of the indictment, and the court of appeals found the indictment had not been constructively amended. See United States v. Peoples, 6 Fed. Appx. 386, 2001 U.S. App. LEXIS 7625 at *4-7. A constructive amendment occurs when the offense proven at trial falls outside the indictment's parameters, though "not every variation from the verbiage of the indictment, either in terms of proof or jury instructions, constitutes a constructive amendment." United States v. Baker, 227 F.3d 955, 960 (7th Cir. 2000).

This indictment specified "a firearm" as the dangerous weapon rendering the four bank robberies aggravated, and the twelfth jury instruction masked this language by requiring proof of use of a dangerous weapon during the robbery. Evidence relating to either the Tech-9 assault weapon or a BB gun, and references to that evidence in argument, would have legitimately fallen within the indictment's compass of charging the use of a dangerous weapon. Even were the BB gun not within the definition of firearm, the court of appeals already has found (law of the case) there was evidence linking Mr. Peoples to the Tech-9 during each robbery so that any reference to a second gun is not so serious that but for it the defendant probably would have been acquitted. See id. at 963.

The same proposed amendment offers the basis for Mr. Peoples's contention as to counts three and seven of the indictment, which charged him with knowingly using fire to commit a felony. Mr. Peoples appears to say the act of escaping with money stolen in a bank robbery and the getaway, though perhaps part of the continuing crime of bank robbery, could not have been a continuing part of an aggravated bank robbery, should a weapon no longer be used. He says instruction fourteen constructively amended the indictment by not requiring proof that fire had been knowingly used to commit aggravated bank robbery in the escape. He also contends that if aggravated bank robbery continues through the escape, then the December 26 robberies

were one and the same because they were committed only minutes apart.

Neither contention is persuasive. The two December 26 robberies were clearly two separate criminal acts. Nor did instruction fourteen constructively amend the indictment; read as a whole that instruction required the jury to find the knowing use of fire to commit aggravated bank robbery even through the continuation of that crime in the getaway, during which the evidence shows the defendants still possessed the firearm used in the crime. There was no constructive amendment.

Mr. Peoples last proposes in his offered amendment to argue that the government offered conflicting theories in closing argument and misstated material evidence—claims his appellate counsel neglected to raise on direct appeal. Neither argument is stronger than the other myriad issues appellate counsel raised in Mr. Peoples's behalf on direct appeal so as to overcome the presumption of effective assistance of counsel. See Mason v. Hanks, 97 F.3d at 893. Because these arguments and those on constructive amendments fail to show ineffective assistance of appellate counsel, the proposed amendment would be futile, and the court denies Mr. Peoples's second motion to amend. See Campania Mgmt. Co. v. Rooks, Pitts & Poust, 290 F.3d at 849.

Last in his original petition, Mr. Peoples says his appellate counsel failed to argue ineffective assistance of counsel on appeal while at the same time preserving that claim for a § 2255 petition. Mr. Peoples appears to want his cake and eat it too: on one hand, he alleges ineffective assistance because his motions and appeals, in his eyes, fell short of adequately addressing his claims; on the other hand, he appears to allege ineffective assistance for counsel presenting those claims at all, such that he now faces doctrinal or procedural bars to his § 2255 petition. Mr. Peoples repeatedly makes it clear he wanted these claims raised on direct appeal (and he did the same in his second appeal), and Galbraith v. United States,

313 F.3d 1001, 1007-1008 (7th Cir. 2002), teaches this move was wise with respect to most of his ineffective assistance claims. Mr. Kus cannot be blamed for the effects on this petition the law gives to the presentation and consideration of those arguments in an earlier appeal.

In short, conducting an independent review of every allegation Mr. Peoples makes against his trial or appellate counsel in the attempt to show their ineffective assistance—whether the allegation faces the hurdles of procedural default or the law of the case doctrine or not—reveals that his case has not been prejudiced within Strickland's meaning by any of these alleged errors (and at least in some instances that the errors were not errors of constitutional magnitude in the first place). Mr. Peoples has not shown a sufficient basis for collaterally attacking his sentence, so his § 2255 petition must be denied.[3]

For the foregoing reasons, the court DENIES AS MOOT Mr. Peoples's motion to proceed *in forma pauperis* [Docket No. 287], his motion to subpoena and conduct an *in camera* review of medical records [Docket No. 289], and his motion for leave to file discovery and for appointment of counsel [Docket No. 296]; GRANTS his motion to file an oversize reply brief [Docket No. 308]; DENIES his first and second motions to amend his petition [Docket Nos. 292 and 304]; and DENIES his petition under 28 U.S.C. § 2255 [Docket No. 288].

SO ORDERED.

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[3] In light of this ruling, Mr. People's motion for leave to file discovery and for appointment of counsel are moot, so must be denied as such.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[May 13, 2003]

Cause No. 3:02-CV-0704 RM
(arising from 3:98-CR-0055 RM)

ROBIN L. PEOPLES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Robert L. Miller, Jr., Chief Judge

ORDER

On May 5, Robin Peoples filed a *pro se* Rule 59(e) motion to amend or alter the April 22 judgment on his petition under 28 U.S.C. § 2255 and a motion for leave to file his supporting brief within ten days. Mr. Peoples provides some explanation for the timing of his Rule 59(e) filing, but offers no basis for Rule 59(e) relief or for his extension of time other than to say in conclusory fashion that he "can show serious constitutional violations." This is insufficient to support his two requests, so both are now DENIED.

SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[June 12, 2003]

Cause No. 3:02-CV-0704 RM
(arising from 3:98-CR-0055 RM)

ROBIN L. PEOPLES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Robert L. Miller, Jr., Chief Judge

ORDER

On May 13, the court denied Robin Peoples's Rule 59(e) motion and his request for an extension of time to file a supporting brief. Mr. Peoples now asks the court to reconsider those rulings. Mr. Peoples originally offered no basis for Rule 59(e) relief or for his extension of time other than to say in conclusory fashion that he "can show serious constitutional violations," but that wasn't sufficient to support his requests. Mr. Peoples hasn't shown a serious error in denying his requests for this reason, so his motion to reconsider must be denied.

Mr. Peoples does present evidence with his motion to reconsider, but this is not the proper occasion to present evidence that could have been adduced for his § 2255

petition. Mr. Peoples also cites new law, Massaro v. United States, 123 S. Ct. 1690 (2003), a case the court also saw the day or so after it denied his § 2255 petition. Massaro held that an ineffective assistance of counsel claim could not be procedurally defaulted, and though this was one reason why Mr. Peoples's § 2255 petition was denied, it was only one of many reasons, so the outcome of his petition would not change.

Accordingly, the court DENIES Mr. Peoples's motion to reconsider [Docket No. 319].

SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[July 2, 2003]

Cause No. 3:02-CV-0704 RM
(arising from 3:98-CR-0055 RM)

ROBIN L. PEOPLES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Robert L. Miller, Jr., Chief Judge

ORDER

Robin Peoples, proceeding *pro se*, requests a certificate of appealability to allow him to appeal the April 22 denial of his 28 U.S.C. § 2255 petition. See 28 U.S.C. § 2253(c). Mr. Peoples has submitted a brief and exhibit to support his request; some of his submissions concern issues the court decided in its April 22 order, while parts concern new issues.

A "certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Williams v. Parke, 133 F.3d 971, 975 (7th Cir. 1998). Mr. Peoples must show his constitutional issues are "debatable among jurists of reason" or "deserve encouragement to proceed further," Ouska v. Lynn Cahill-Masching, 246 F.3d

1036, 1046 (7th Cir. 2001); Porter v. Gramley, 112 F.3d 1308, 1312 (7th Cir. 1997)—a standard recently touched on in Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 1039-1040 (2003).

Mr. Peoples has not met his burden. His new issues cannot be certified for appeal because this court had no occasion to address them. See Miller-El v. Cockrell, 123 S. Ct. at 1039 (a COA determination looks to the district court's resolution of a petitioner's constitutional claims and asks whether that resolution was debatable among reasonable jurists). His claims of actual innocence cannot be certified because they are not constitutional claims. See Schlup v. Delo, 513 U.S. 298, 315 (1995); Ruth v. United States, 266 F.3d 658, 661 (7th Cir. 2001); Milone v. Camp, 22 F.3d 693, 700 (7th Cir. 1994).

This leaves Mr. Peoples's ineffective assistance of counsel claims, but he has not substantially shown he was denied his right to counsel's assistance. It cannot be debated that Mr. Peoples had already presented many of his allegations on appeal—indeed twice—and those appeals established the law of the case that his trial counsel performed well within acceptable bounds. Those two appeals and the resolution of his collateral attack go far to belie the proposition that reasonable jurists could debate his allegations of ineffective assistance.

Mr. Peoples's old allegations of ineffective assistance often dovetailed into his new allegations of ineffective assistance—despite any effects the law of the case doctrine had, see, e.g., United States v. Sumner, 325 F.3d 884, 891 (7th Cir. 2003); Daniels v. United States, 26 F.3d 706, 712 (7th Cir. 1994)--so the court considered their merits.[1] The court cannot say his ineffective assistance claims for any genuine reason deserve encouragement to proceed further.

[1] This was also done despite the procedural default that could apply before Massaro v. United States, 123 S. Ct. 1690 (2003) (holding that an ineffective assistance of counsel claim could not be procedurally defaulted), a decision handed down shortly after the court denied Mr. Peoples's § 2255 petition.

Reasonable jurists might debate whether Mr. Peoples's allegations showed his attorneys to have performed less than acceptably, but reasonable jurists could not dispute that his allegations come far short of showing prejudice—that but for the claimed errors his proceedings would have turned out differently. See Strickland v. Washington, 466 U.S. 668, 693-694 (1984); see also Williams v. Taylor, 529 U.S. 362, 390-394 (2000); United States v. Pergler, 233 F.3d 1005, 1008-1011 (7th Cir. 2000).

Accordingly, the court DENIES Mr. Peoples's request for a certificate of appealability [Docket No. 322].

SO ORDERED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[October 7, 2003]

03-2774

ROBIN L. PEOPLES,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before Hon. Ilana Diamond Rovner, Circuit Judge.

ORDER

Robin Peoples has filed an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find that Peoples has made a substantial showing of the denial of a constitutional right as to whether counsel rendered ineffective assistance in violation of the Sixth Amendment due to a conflict of interest, an improper stipulation, failure to request a jury instruction on flight, and for incorrect remarks about the gang involvement of a codefendant. *See* 28 U.S.C. §2253(c)(2). Additionally, the parties should address how *Massaro v. United States*, 123 S. Ct. 1690, 1693-94 (2003), affects Peoples's ability to raise his ineffective assistance of counsel claims on collateral attack.

Accordingly, the request for a certificate of appealability is GRANTED. Peoples's motion to proceed in forma pauperis

is GRANTED. The court sua sponte appoints counsel to represent Peoples in this appeal. An order will follow naming counsel and setting a briefing schedule.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[April 6, 2005]

03-2774

ROBIN L. PEOPLES,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before EASTERBROOK, RIPPLE, and WILLIAMS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Robin Peoples is here for the third time contesting his convictions for bank robbery and associated offenses. Each time he has argued that he received ineffective assistance of counsel. Twice we resolved this claim on the merits; that is enough (if not once more than enough), and we decline to revisit the subject.

On his direct appeal Peoples's appellate lawyer challenged the competence and dedication of his trial lawyer. That was a risky tactic, given the circuit's rule, see *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991), that such a contention normally may be raised only once, and the fact that an ineffective-assistance claim is unlikely to succeed without additional evidence showing why trial counsel had acted as he did, and what the adverse consequences of a mistake would have been. But it may have been justified in this case, because by the time of the appeal the district judge had held a hearing on Peoples's request for a new trial, and

evidence about his original attorney's conduct had entered the record. (He had a different attorney on appeal.) So we addressed the subject on the merits, though the decision was not to Peoples's liking. *United States v. Peoples*, 2001 U.S. App. LEXIS 7625 (7th Cir. Apr. 11, 2001) (unpublished order).

Meanwhile the new-trial request (Peoples had filed three motions) was still brewing in the district court. The district judge should have treated these as collateral attacks under 28 U.S.C. §2255 but did not warn Peoples that his motions would use up the only collateral review allowed as of right, and as a result they did not count as an initial round of collateral review. See *Castro v. United States*, 540 U.S. 375 (2003). The district judge denied these motions on the merits, and we affirmed, addressing the ineffective-assistance claim again, and with the same outcome. *United States v. Peoples*, 2002 U.S. App. LEXIS 14401 (7th Cir. July 16, 2002) (unpublished order).

His opportunities for direct review used up, Peoples filed a motion that was acknowledged to be under §2255 Once again he complained about the legal assistance he had received. The district judge balked at evaluating the protest. He pointed out that he had done so once already, and we had done so twice. Circuit law is clear, the judge remarked, that a "defendant who complains on direct appeal about the quality of his lawyer can't try again on collateral attack unless there has been an intervening change of law." *Ryan v. United States*, 214 F.3d 877, 879 (7th Cir. 2000). Discovery of previously withheld evidence also might reopen the subject, see *Taglia*, 922 F.2d at 418, but Peoples did not contend either that hidden evidence had at last surfaced or that the law governing his contentions had morphed since our second decision. All he did was add to the list of failings that he attributed to his former lawyers, but the district judge held that this is exactly the sort of thing that the law of the case cuts off: it blocks new theories as well as old ones. See, e.g., *Ryan*, 214 F.3d at 878-79; *People Who Care v. Rockford*

Board of Education, 171 F.3d 1083, 1088 (7th Cir. 1999); cf. *Barrow v. Falck*, 11 F.3d 729 (7th Cir. 1993). The twin goals of this doctrine are to ensure that the parties marshal all of their facts and arguments so that a dispute may be resolved in one pass, and to conserve judicial resources. Treating new arguments as grounds for a second decision would contradict both rationales and in practical effect abandon the doctrine.

On this third appeal, and with the assistance of a third legal team, that is exactly what Peoples asks us to do. He contends that we should abrogate the doctrine of law of the case for all collateral proceedings and allow defendants freely to raise the same issue twice, once on direct appeal and again on collateral review, even if the law is unchanged and no new facts have come to light. He relies principally on two decisions: *Massaro v. United States*, 538 U.S. 500 (2003), and *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc). *Galloway* is incompatible with this circuit's law (and with the Supreme Court's as well), and *Massaro* is irrelevant. But we begin with first principles.

Taglia did not invent the rule that a person who has raised an issue, and had it resolved by a federal court, cannot start from scratch on collateral review and ask the judiciary to proceed as if the first resolution had not occurred. This is a longstanding rule of federal practice. See, e.g., *Himely v. Ross*, 9 U.S. (5 Cranch) 313 (1809); *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481 (1858); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). True enough, issue preclusion and claim preclusion (collateral estoppel and res judicata) do not apply on collateral review; if they did, there would be no collateral review. See *Salinger v. Loisel*, 265 U.S. 224 (1924); *Wong Doo v. United States*, 265 U.S. 239 (1924). But federal courts employ the more flexible doctrine of law of the case even when rules of preclusion do not govern. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-18 (1988). This is true in collateral proceedings as well as in normal civil litigation.

Sanders v. United States, 373 U.S. 1 (1963), restated these common-law norms, which have been modified by the Antiterrorism and Effective Death Penalty Act for successive collateral reviews but left in place for the initial round. (Although *Sanders* dealt with successive rounds of collateral proceedings, the Court has held that its approach applies equally when the same issue is raised on direct appeal and again on an initial round of collateral review. See *Davis v. United States*, 417 U.S. 333, 342 (1974).) The Court held in *Sanders* that an initial federal determination controls in subsequent rounds of review if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15. What *Davis*, *Taglia* and other decisions, such as *Ryan* and *United States v. Mazak*, 789 F.2d 580 (7th Cir. 1986), add to *Sanders* is that the "ends of justice" *do* support relitigation when the substantive law has changed or when evidence that could not have been discovered earlier despite diligent inquiries at last comes to light. (The AEDPA codifies a similar standard for relitigation. See 28 U.S.C. §2244(b)(2).) See also *Dobbs v. Zant*, 506 U.S. 357 (1993) (suggesting that the undeveloped- record exception to the common-law doctrine may be limited to capital cases).

Peoples presented ineffective-assistance arguments in his two prior appeals. That ground was resolved adversely to him on the merits, twice. Although Peoples now wants to present new instances of supposed shortcomings, ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief. See *Bell v. Cone*, 535 U.S. 685, 697 (2002); *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *Holman v. Gilmore*, 126 F.3d 876, 881-84 (7th Cir. 1997).

That point was made with more generality in *Sanders*: "By 'ground' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations." 373 U.S. at 16. See also *Brannigan v. United States*, 249 F.3d 584, 587 (7th Cir. 2001), for a similar definition of a "claim" in the law of collateral review. Just as one who makes and loses a contention that a confession is involuntary because of physical coercion cannot start over by adding an allegation of psychological coercion, one who makes and loses a contention that counsel was ineffective for four reasons cannot start over by choosing four different (or four additional) failings to emphasize.

Let us turn, then, to the question whether *Massaro* supports a different understanding. The Court held in *Massaro* that a defendant never forfeits a claim of ineffective assistance by waiting until collateral attack. It disapproved our contrary decision in *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993), which had held that a defendant who has new counsel on appeal, and who does not contend that any material outside the trial record is essential to evaluating the claim, must raise it at once or forever lose the opportunity to do so. But *Massaro* does not hold that the same ground of relief may be raised *twice*, once on direct appeal and again on collateral review. The question was left open. 538 U.S. at 508-09. Since *Massaro* we have reiterated that a defendant who chooses to make an ineffective-assistance argument on direct appeal cannot present it again on collateral review. See, e.g., *Fuller v. United States*, 398 F.3d 644, 649 (7th Cir. 2005); *Harris v. United States*, 366 F.3d 593, 595 (7th Cir. 2004). Cf. *White v. United States*, 371 F.3d 900 (7th Cir. 2004)

(defendant who presents an argument on direct appeal, and therefore cannot present it in an initial collateral proceeding, cannot present the same ground on second or successive collateral proceeding either).

Now if the reason why Peoples made an ineffective assistance claim on direct appeal was that our decision in *Guinan* compelled him to do so before essential support could be assembled and placed in the record, then *Massaro* would be a good reason to allow him to press the argument now. Peoples does not make such a contention, however. *Guinan* itself, and successors such as *Duarte v. United States*, 81 F.3d 75 (7th Cir. 1996), allowed ineffective-assistance claims to be postponed when delay was needed to assemble evidence. Peoples does not contend that *Guinan* compelled him to present the argument prematurely; instead he was chomping at the bit to get this issue before us, which is why he made three motions for a new trial and filed a second appeal. Nothing in *Guinan* required *that* procedure. The earlier presentations were by choice rather than under compulsion, so *Massaro* does not open a third window of opportunity.

Galloway shows that the tenth circuit sees this issue differently. It did so because the judges thought it too labor-intensive to determine whether the initial decision is conclusive, when the defendant always can come up with reasons—newly discovered evidence, supposed changes of law, protests about the wisdom of appellate counsel's selection of issues—to avoid the effect of the initial decision. Instead of stewing about procedural doctrines, the tenth circuit concluded, judges should tackle the merits directly. *Galloway* did not attempt to reconcile this approach with *Davis* and *Sanders*, which the decision does not cite, and did not consider how permitting relitigation affects incentives in the initial appeal. When a court decides not to enforce rules that limit relitigation, it not only reduces the litigants' incentives to get things right the first time but ensures that judges will encounter the same claim repeatedly. Although it may be extra work to enforce rules against relitigation in a

given case, doing so has valuable effects for many future cases in which litigation will be conducted more expeditiously and with better information. *Galloway* therefore does not persuade us to abandon the doctrine of law of the case in federal collateral review under §2255. The tenth circuit stands alone on this subject.

This is not to say that *Galloway* misunderstood the extent of legal ingenuity. In the district court Peoples insisted that his prior appellate lawyer had furnished ineffective assistance by contending that his trial lawyer furnished ineffective assistance. The idea is that, if representation on direct appeal was indeed constitutionally deficient, then Peoples would be entitled to present his claims anew with the assistance of competent lawyers. This line of argument overlooks the fact that on his second direct appeal Peoples dismissed his lawyers and chose to represent himself. One who exercises the right of self-representation cannot contend that he received ineffective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). On that second appeal Peoples presented, and we resolved on the merits, an ineffective-assistance claim. On this third appeal Peoples has another team of lawyers, and they have dropped any challenge to the adequacy of prior appellate counsel. The only argument is that Peoples received ineffective assistance at trial. That argument has been considered and rejected before; it is no longer open.

AFFIRMED

FILED
SEP 6 - 2005
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SUPREME COURT, U.S.

No. 05-42

In the Supreme Court of the United States

ROBIN L. PEOPLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the law of the case doctrine barred petitioner from bringing a claim of ineffective assistance of counsel in a motion under 28 U.S.C. 2255 when petitioner had twice raised a claim of ineffective assistance of counsel on direct appeal and the court had rejected the claim on both occasions.

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In the Supreme Court of the United States

No. 05-42

ROBIN L. PEOPLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 60a-66a) is reported at 403 F.3d 844. The opinion of the district court (Pet. App. 37a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2005. The petition for a writ of certiorari was filed on July 1, 2005. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on four counts of armed bank robbery, in violation of 18 U.S.C. 2113(d); four counts of using or

carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); two counts of using fire to commit a federal felony, in violation of 18 U.S.C. 844(h); and two counts of destroying a vehicle by means of fire, in violation of 18 U.S.C. 844(i). He was sentenced to a total of 1329 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed (Pet. App. 15a-21a), and this Court denied certiorari (*id.* at 22a).

Petitioner filed a motion for a new trial. The district court denied the motion (Pet. App. 23a-29a), and the court of appeals affirmed (*id.* at 32a-33a). Petitioner then filed a motion pursuant to 28 U.S.C. 2255. The district court denied the motion (Pet. App. 37a-51a), and the court of appeals affirmed (*id.* at 60a-66a).

1. In late 1997 and early 1998, petitioner, along with several accomplices, robbed four banks near South Bend, Indiana. First, on December 12, 1997, petitioner and three accomplices robbed the Oak Manor branch of the National Bank of Detroit in Elkhart, Indiana, taking approximately $25,000. Petitioner brandished a Tec 9 assault firearm during the robbery. Petitioner and two others went inside the bank. Petitioner was the leader of the group and provided instructions to the other two during the robbery. The fourth member of the group drove the getaway vehicle, a 1997 Ford Expedition, which petitioner and others had stolen from a car dealer earlier that day. The group abandoned the Expedition a short distance from the bank and entered a sedan owned by petitioner's mother. After the crew switched cars, petitioner doused the Expedition with gasoline and set it on fire. Gov't C.A. Br. 5-6.

On December 26, 1997, petitioner and two accomplices robbed two banks. In the first robbery, the group

stole approximately $23,000 from the Lake City Bank in Elkhart, Indiana. Shortly thereafter, the group stole approximately $13,000 from Valley American Bank in Osceola, Indiana. Petitioner used the same Tec 9 during these robberies that he had used in the December 12 robbery, and he was again the leader of the crew. As in the December 12 robbery, petitioner and his accomplices stole a sport utility vehicle, this time a 1996 Chevy Tahoe, on the morning of the robbery. The group used the Tahoe as a first getaway vehicle. Within a few minutes of the robberies, they abandoned the Tahoe and entered petitioner's mother's car. Petitioner then set the Tahoe on fire. Gov't C.A. Br. 6.

Finally, on February 17, 1998, petitioner and two accomplices robbed a branch of the National Bank of Detroit in Elkhart, Indiana, stealing approximately $44,000. Petitioner again was the leader of the crew, and he again used the same Tec 9 he had used during the first three robberies. Petitioner and his accomplices stole an Oldsmobile Bravada sport utility vehicle from a Michigan dealer and used it as a first getaway vehicle. Petitioner drove the Bravada before and after the robbery and abandoned it soon after the robbery. Gov't C.A. Br. 6-7.

Petitioner was the leader, organizer, and planner of the four bank robberies. He had attempted, unsuccessfully, to recruit others to help in the fourth robbery. Petitioner was also principally responsible for the theft of the three vehicles that were used as initial getaway cars, and for destroying two of those vehicles by fire. In addition, petitioner was responsible for destroying the clothing used in the robberies. Gov't C.A. Br. 7-8.

2. a. In a 12-count indictment, a federal grand jury charged petitioner and his accomplices with aggravated

robbery of four banks, the carrying and use of firearms during the bank robberies, the use of fire to commit two of the robberies, and the malicious destruction by fire of two stolen getaway vehicles. Petitioner's co-defendants pleaded guilty, but petitioner went to trial. Petitioner was found guilty on all counts. Gov't C.A. Br. 2; Pet. App. 15a-16a.

b. Before sentencing, the district court granted petitioner's motion for appointment of new counsel. Petitioner filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33, arguing that he had been denied the effective assistance of counsel. Petitioner argued that his lawyer had been under the influence of alcohol at trial, had not prepared adequately for trial, and had failed adequately to object during jury selection. Pet. App. 5a-10a, 19a-20a.

After conducting an evidentiary hearing, the district court denied petitioner's motion for a new trial. Pet. App. 2a-14a. The court found nothing in the record to support petitioner's allegation that his counsel had been under the influence of alcohol during trial. *Id.* at 5a. With respect to petitioner's remaining complaints concerning his attorney's performance at trial, the court ruled that they "[a]ll suffer from a lack of proof, from [petitioner's] lack of understanding of the law, and or from [petitioner's] lack of credibility." *Id.* at 5a-6a. The court thus rejected on both factual and legal grounds petitioner's various arguments concerning his counsel's performance at trial. *Id.* at 6a-9a.

c. On appeal, petitioner, represented by new counsel, renewed his contention that his trial counsel had been ineffective. The court of appeals rejected that argument and affirmed petitioner's convictions. Pet. App. 15a-21a. The court observed that "the district court, in a well-

reasoned opinion," had "denied [petitioner's] ineffective assistance of counsel claim," and that the district court had given "little or no weight to [petitioner's] allegations that he received subpar representation from his trial counsel." *Id.* at 19a. The court of appeals concluded that petitioner had "point[ed] to no fundamental flaw in the district court's analysis," and the court "agree[d] with the district court that the record contain[ed] no evidence demonstrating that trial counsel rendered substandard assistance or caused actual prejudice to [petitioner's] defense." *Ibid.*

d. Petitioner filed a petition for a writ of certiorari, which this Court denied. Pet. App. 22a.

3. a. While the appeal from his conviction was pending, petitioner, acting pro se, filed in the district court another motion for a new trial, again arguing ineffective assistance of counsel. Petitioner contended, *inter alia*, that his trial counsel's mental condition had rendered him unable to provide effective assistance. Pet. App. 27a-28a, 32a.

b. The district court denied petitioner's motion. Pet. App. 23a-29a. The court explained that it "already ha[d] sufficiently addressed [petitioner's] claims concerning his trial counsel," and had "concluded that [petitioner] received effective assistance." *Id.* at 27a. The court reiterated that counsel's "performance exceeded any objective standard of reasonableness," and that petitioner had "come far short of demonstrating that but for any unprofessional error [counsel] is alleged to have committed, the result of the proceeding would have been different." *Ibid.* The court rejected petitioner's attempt to call his counsel's mental condition into doubt based on his counsel's subsequent suicide. In the court's view, the

suicide, "while tragic, * * * has virtually no probative value here." *Id.* at 28a.

c. The court of appeals affirmed. Pet. App. 30a-33a. The court rejected petitioner's argument that his counsel was ineffective. The court explained that it had found in petitioner's initial appeal that "his trial attorney's performance was well within the bounds of acceptable performance." *Id.* at 32a. Although petitioner claimed, based on what he characterized as newly discovered evidence, that his counsel's mental condition had rendered him unable to provide effective assistance, the court of appeals did "not consider the 'new evidence' * * * to describe any errors serious enough to implicate his attorney's performance under the standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984)." *Ibid.*

4. a. While his second appeal was pending, petitioner filed a motion pursuant to 28 U.S.C. 2255, again arguing ineffective assistance of counsel. Petitioner claimed, *inter alia*, that his trial counsel had failed to object to alleged prosecutorial misconduct, had failed to request a flight instruction, had made misstatements concerning a co-defendant's gang involvement, and had operated under a conflict of interest by putting his financial needs ahead of petitioner's interests. Pet. App. 39a-40a. Petitioner also argued that his appellate counsel in his first appeal had been ineffective in failing to raise certain aspects of trial counsel's allegedly deficient performance. *Id.* at 42a-43a.

b. The district court denied petitioner's Section 2255 motion. Pet. App. 37a-51a. The court explained that petitioner's "current allegations largely mirror * * * arguments made in his prior appeals," *id.* at 40a, and that the new evidence he relied on was "largely the same evidence and post-trial events he offered the court of

appeals the second time it addressed his ineffective assistance of counsel claim," *id.* at 41a. The court concluded that the law of the case doctrine precluded petitioner from presenting "theories of ineffective assistance he could have offered in his prior appeals but didn't." *Ibid.*

The district court explained, however, that petitioner's claims concerning his appellate counsel's ineffectiveness were not subject to the law of the case doctrine. Because the claims concerning appellate counsel concerned the failure on appeal to raise certain aspects of trial counsel's performance, the court found "some value in discussing the allegations" against trial counsel, "despite the effects [of] the law of the case or procedural default rules." Pet. App. 43a. Accordingly, the court addressed and rejected petitioner's arguments that his trial counsel was ineffective. *Id.* at 43a-45a.

In particular, the district court found that petitioner's claims concerning his trial counsel's alleged conflict of interest were baseless. The court explained that none of the claims that counsel had placed his own financial interests above petitioner's interests "in any way show[] how [counsel's] performance suffered at trial, nor how the proceeding's outcome was adversely affected." Pet. App. 43a. The court also rejected petitioner's argument that counsel should have objected to the government's closing argument. The court explained that the prosecutor's statements identified by petitioner were either unobjectionable or harmless. *Id.* at 44a-45a. Finally, the court found that petitioner's remaining arguments could have been raised in either of his first two appeals, and in any event "would not show a violation of *Strickland*." *Id.* at 45a.